Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BARNEY QUILTER, *et al.*,
Appellants,
v.
GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

In this case, a majority of the three-judge federal district court, acting on remand from this Court, held that four of Ohio's 99 state House Districts were not drawn in violation of the Equal Protection Clause of the Fourteenth Amendment, and further held that Appellants lack standing to challenge four other districts. The questions presented on this appeal are:

1. Is a districting plan unconstitutional if race was the primary and overriding factor considered by the drafters, yet the challenged districts coincidentally are compact and adhere to other (but not all) traditional districting principles?

2. Did the district court err in concluding that strict scrutiny will not apply unless the plaintiffs show that the defendants substantially disregarded or neglected traditional districting criteria, and that such neglect is predominantly due to the misuse of race?

3. Did the district court err in holding that the relevant "focus of the inquiry" is whether the "defendants shoved traditional [districting principles] aside," or "flagrantly ignored" such principles, in order to achieve a particular race-based result?

4. Did the district court err in concluding that strict scrutiny was not triggered where there was direct evidence that race was the primary factor in the drawing of the challenged districts, and where the lines in five of the eight challenged districts were drawn specifically for the purported purpose of guaranteeing the election or enhancing the possibility of electing a new black candidate?

5. Do the Appellants who reside in four of the challenged districts have standing to challenge the entire districting plan?

6. Do the Appellants who are minority members of the Apportionment Board have standing to challenge the entire districting plan?

LISTING OF ADDITIONAL PARTIES

Appellants

THOMAS E. FERGUSON, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, TYRONE RILEY, RICHARD CORDRAY, PAUL MECHLING, RONALD GERBERRY, Representative of the 65th Ohio House District, MARY ABEL, Representative of the 78th Ohio House District, and WILLIAM MALLORY.

Appellees

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Secretary to the Apportioning Persons.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The August 22, 1997, Opinion of the three-judge district court has not been officially reported. It is set out in the Appendix hereto at App. 1a.

The August 11, 1995, Opinion of the three-judge district court has been officially reported at 912 F. Supp. 1006. It is set out in the Appendix hereto at App. 63a.

The May 26, 1995, Opinion of the three-judge district court has not been officially reported. It is set out in the Appendix hereto at App. 113a.

The April 28, 1995, Opinion of the three-judge district court has not been officially reported. It is set out in the Appendix hereto at App. 160a.[1]

JURISDICTION

The Order appealed from was filed on August 22, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the texts of the Fourteenth Amendment to the United States Constitution, 28 U.S.C. §§ 1253 & 2284, 42 U.S.C. § 1973, and Article XI of the Ohio Constitution are set out at App. 241a-252a.

STATEMENT OF THE CASE

In Ohio, unlike many other states, the authority to reapportion following a decennial census is conferred upon an Apportionment Board (the "Board") that acts within narrowly confined limits set by the Ohio Constitution. Ohio Constitution, Article XI. The 1991 Board consisted of Appellees George V. Voinovich, Governor of the State of Ohio, Robert A. Taft II, Secretary of State of Ohio, and Stanley J. Aronoff, former President of the Ohio Senate (the "majority members" of the Board); and Appellants Thomas E. Ferguson, then Auditor of the State of Ohio and Barney Quilter, then Speaker *Pro Tempore* of the Ohio House of Representatives (the "minority" or

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[1] Other opinions and orders entered in this case include: (1) *Voinovich v. Quilter*, —— U.S. ——, 116 S. Ct. 2542 (1996); (2) *Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio May 26, 1995) (D. 325); (3) *Quilter v. Voinovich*, 857 F. Supp. 579 (N.D. Ohio 1994); (4) *Voinovich v. Quilter*, 507 U.S. 146, 113 S. Ct. 1149 (1993); (5) *Quilter v. Voinovich*, 794 F. Supp. 760 (N.D. Ohio 1992); (6) *Quilter v. Voinovich*, 794 F. Supp. 756 (N.D. Ohio 1992); (7) *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992); and (8) *Quilter v. Voinovich*, 1992 WL 677145 (N.D. Ohio Mar. 19, 1992).

"dissenting members" of the Board). The majority members of the Board appointed James R. Tilling ("Tilling") as its Secretary; Tilling's primary function was to create a plan of apportionment.

Tilling, at the direction of the majority Board members, set about his task with the specific purpose of consciously separating voters by race. He purportedly did so in order to guarantee the election of new (non-incumbent) black legislators. As set forth in the Board's Findings of Fact and Conclusions of Law ("Board Findings"), adopted by the majority Board members on February 18, 1992, the Board acted under the premise that during the decade of the 1990's, some or all of Ohio's incumbent black legislators might retire, die or move on to other political posts. Board Finding No. 172, D. 147, Ex. A at 73. With that assumption as his guide, Tilling's stated objective was to "ensure" that a black incumbent's replacement (always assumed to be another black person) would be elected. *Id.* at 71.[2]

The direct evidence that the Board, and Tilling, primarily were motivated by race in drawing district lines is overwhelming. In addition to the numerous admissions in the Board's Findings, D. 147, Tilling's handwritten notes and maps, D. 154, Ex. 120, contain substantial direct evi-

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[2] The Board, in its Findings, attempted to justify its actions by relying on a regression analysis of the effect of incumbency in elections in Ohio minority districts for the years 1984, 1986, 1988 and 1990. Board Finding No. 173, D. 147, Ex. A at 73. Dr. King, Appellees' expert, found that for those years, black incumbents had an election advantage of 6-10% over non-incumbents. *Id.* Purportedly to ensure that a new black candidate, running without the incumbency advantage, would be guaranteed election, Tilling drew race-based district lines calculated to provide new black candidates with election margins of not less than 68% and as high as 81%, averaging 77.6%. *Id.* at 75. Black incumbents themselves would be elected under Tilling's plan by margins of no less than 75% and as high as 89%, averaging 80%. *Id.* Tilling himself admitted that such electoral margins constitute "landslides." D. 312 at 313.

dence of race-based line drawing. Tilling began the redistricting process by displaying the minority populations of each urban county on his computer screen and drawing "minority districts" first, before attempting to ascertain which pre-existing districts could have been retained, as required by Ohio Constitution, Article XI, § 7(D). D. 154, Ex. 120. For example, Tilling's notes state, with respect to Franklin County, "[a]void primarily white Bexley and Whitehall." *Id.* In Hamilton County, Tilling's notes confirm his intention to

> "start with majority-minority districts, begin around the downtown area and configure a district including the greatest portion of the eastern segment of black population, mostly City of Cincinnati."

Id. at 4. In Summit County, Tilling "tr[ied] to maximize the minority voters in [Vernon Sykes'] district." *Id.* at 6.

On November 1, 1991, Appellants commenced this action in the United States District Court for the Northern District of Ohio challenging the apportionment plan adopted by the Board on October 1, 1991,[3] D. 1, alleging that the Board's conscious use of race in redistricting violated the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. D. 1. On January 31, 1992, the District Court ruled that Amendment C violated the Voting Rights Act. *Quilter v. Voinovich*, 794 F. Supp. 695, 701-02 (N.D. Ohio 1992). The District Court concluded that there was "no legal mandate or finding of a Voting Rights Act violation to justify [Appellees'] creation of majority-minority districts wherever possible in the 1991 Apportionment Plan," and directed the Board either to show justification for its use of race in drawing districts or to submit a revised plan within twenty days. *Id.* at 701-02.

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[3] That plan was designated "Amendment C". D. 154, Ex. 17 at 9-14.

In response to the District Court's directive, the majority Board members, on February 18, 1992, signed and submitted their Findings of Fact and Conclusions of Law. D. 147, Ex. A. Immediately following the adoption of their Findings, the majority members of the Board also adopted Amendment D, the plan at issue in this case. *Id.* at 107. Amendment D contained "technical corrections" to the draft plan (Amendment C), and reduced the number of majority-minority districts from eight to five. However, Amendment D perpetuated the race-based redistricting of Amendment C. *Id.*; D. 147, Ex. C at 59.

On March 10, 1992, the District Court again ruled that Appellees' use of race in redistricting was not justified, and held that Amendment D violated § 2 of the Voting Rights Act and the Fifteenth Amendment. *Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992). On appeal, this Court found that the evidence presented by Appellees failed to demonstrate "sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice." *Voinovich v. Quilter*, 507 U.S. 146, 158, 113 S. Ct. 1149, 1158 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 49, 106 S. Ct. 2752, 2766 (1986)). In that same opinion, this Court reversed the District Court's findings of violations of the Voting Rights Act and the Fifteenth Amendment, and remanded the case to the District Court for a determination of whether the plan's deviation from equal population among districts violated the Fourteenth Amendment. *Voinovich*, 507 U.S. at 152, 113 S. Ct. at 1154.

Following remand, Appellants amended their complaint to challenge Appellees' admitted use of race in their plan as a violation of the Fourteenth Amendment, as recognized by this Court in *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993). Appellants' *Shaw* claim was tried to the District Court on November 16-17, 1994. Once again, Appellees' plan was found to be unconstitutional.

Specifically, on April 28, 1995, the District Court held that race was a "substantial and motivating factor" in the creation of at least House Districts 21, 22, 30, 31, 38, 39, 44 and 49, *Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio Apr. 28, 1995), App. 160a at 192a, and directed Appellees to redraw those eight districts. App. 198a. Appellees filed a notice of appeal from that Opinion and Order, despite the fact that final judgment had not been entered. D. 329.

On May 26, 1995, the District Court vacated its April 28 Opinion and issued an amended Opinion that disposed of Appellees' erroneous argument that the Board had not drawn district lines on the basis of race but, rather, had followed the mandates of the Ohio Constitution. *Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio May 26, 1995), App. 113a at 154a-157a and n.19. On June 23, 1995, Appellees noticed their appeal from that decision, even though judgment still had not been entered.

On August 11, 1995, the District Court again clarified its holding by vacating its prior Opinion (D. 341) and issuing a new Opinion framing its analysis of the facts in terms of the standard articulated by this Court in *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995). *Quilter v. Voinovich*, 912 F. Supp. 1006 (N.D. Ohio 1995), App. 63a. In that Opinion, the District Court held that, based upon the evidence presented at trial, race was the predominant factor motivating the decision of the majority Board members. App. 88a-97a. Simultaneously with the filing of this Opinion, the District Court entered judgment in favor of Appellants, D. 344, and Appellees appealed. D. 352.

On June 13, 1996, this Court handed down its decisions in *Shaw v. Hunt*, —— U.S. ——, 116 S. Ct. 1894 (1996) ("*Shaw II*") and *Bush v. Vera*, —— U.S. ——, 116 S. Ct. 1941 (1996). Shortly thereafter, this Court vacated the District Court's August 11, 1995 Opinion and

remanded this action for further consideration in light of *Shaw v. Hunt* and *Bush v. Vera.*

In an opinion issued on August 22, 1997, the District Court held that the challenged plan did not violate the Equal Protection Clause because, despite the overwhelming direct evidence that Tilling and the Board were motivated primarily by race, Appellants somehow failed to show that the Appellees subordinated traditional districting principles to consideration of race. *Quilter v. Voinovich*, No. 5:91CV-2219 (N.D. Ohio Aug. 22, 1997), App. 1a. In reaching this holding, the District Court created and followed a legal standard not articulated or endorsed by this Court:

> "While adherence to traditional districting principles does not automatically create a 'safe harbor' from strict scrutiny, we will not apply strict scrutiny without the 'necessary' showing by the plaintiffs that the defendants neglected traditional districting criteria and that neglect is predominantly due to the misuse of race."

App. 21a. With reservations, the District Court also applied this Court's standing analysis from *United States v. Hays*, 515 U.S. 737, 115 S. Ct. 2431 (1995) and *Shaw II*, 116 S. Ct. at 1900, and held that Appellants lacked standing to challenge four districts. App. 3a-10a. On October 16, 1997, Appellants noticed their appeal. D. 377, App. 239a.[4]

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[4] This controversy is not rendered moot by the upcoming year 2000 census and the redistricting that will follow due to a unique provision in the Ohio Constitution that requires newly-drawn districts to adhere as much as possible to the boundaries of existing districts:

> "In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article."

Ohio Constitution, Article XI, § 7(D). Since future districts must adhere as much as possible to the boundaries of the challenged

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. INTRODUCTION

This case affords this Court an opportunity to clarify, before the decennial census in the year 2000, the standards by which the constitutionality of the use of race in redistricting will be determined in light of *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993) (*"Shaw"* or *"Shaw I"*), and its progeny.[5] Specifically, this case presents the substantial and unresolved question of whether a districting plan is unconstitutional if race was the primary factor considered by the drafters, yet the challenged districts coincidentally are compact and adhere to other (but not all) traditional districting principles.

The need to address and resolve this particular issue is demonstrated by the conflicting holdings of the District Court before and after the last remand from this Court, which holdings were reached upon the *same set of facts* and differ solely because of this Court's continuing (and oft-misunderstood) pronouncements of the governing legal standard. The broader need to address and resolve the widespread confusion surrounding the interpretation of the principles governing *Shaw* claims is demonstrated by numerous law review articles and, more recently, judicial opinions, in which courts and commentators have struggled to ascertain the situations where race-based districting will trigger strict scrutiny under *Shaw I* and its progeny. Given the extent of disagreement and uncertainty among courts and legal commentators, the apportioning bodies similarly will be in need of further guidance from the Court prior to the next round of redistricting.

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districts, the unconstitutionality of the current districts inevitably will taint future districts, unless it is corrected by this Court.

[5] *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995), *United States v. Hays*, 515 U.S. 737, 115 S. Ct. 2431 (1995), *Shaw v. Hunt*, —— U.S. ——, 116 S. Ct. 1894 (1996) (*"Shaw II"*) and *Bush v. Vera*, —— U.S. ——, 116 S. Ct. 1941 (1996).

Other substantial issues presented for this Court's review include whether residents of the challenged districts and minority members of the Apportionment Board have standing to challenge the entire districting plan. Resolution of these issues will require the Court to clarify the connection between the injury caused by racial gerrymandering and the specific persons who have standing to assert a *Shaw* claim—yet another issue that has been the subject of confusion and disagreement among courts and commentators.

II. THE CONSTITUTIONAL CLAIM FIRST ANNOUNCED IN *SHAW v. RENO* AND ADDRESSED IN SUBSEQUENT DECISIONS REQUIRES ADDITIONAL CLARIFICATION BY THIS COURT

In 1993, this Court announced a new constitutional claim that allows challenges to racially-gerrymandered districts under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993) ("*Shaw*" or "*Shaw I*"). Despite this Court's subsequent attempts to clarify this claim, the governing legal standards remain frustratingly elusive. This section briefly reviews the development of the law beginning with the Court's decision in *Shaw*, as viewed by commentators and courts who have struggled to understand and apply the Court's periodic pronouncements of the governing legal standards.

A. *Shaw v. Reno* Recognized a New Challenge to Racially-Gerrymandered Voting Districts

In *Shaw*, the Court considered a challenge to two districts in North Carolina that were bizarrely shaped and indisputably drawn on the basis of race. A five-member majority of this Court concluded that, although race-conscious districting might not always be unconstitutional, the Equal Protection Clause is offended by a districting plan

> "that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."

Shaw, 509 U.S. at 642, 113 S. Ct. at 2824. The Court held that plaintiffs could state a claim

> "by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race."

Id. at 649, 113 S. Ct. at 2828.

This decision caused considerable confusion among scholars, who decried the lack of guidance as to the legal standards applicable to the newly-announced claim.[6] Although one commentator insisted that the opinion "expresses established constitutional doctrine" and "breaks no new ground," [7] two commentators set forth three possible readings of the opinion [8] and two other commentators

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[6] *See, e.g., Conference: The Supreme Court, Racial Politics, and the Right to Vote: Shaw v. Reno and the Future of the Voting Rights Act*, 44 Am. U. L. Rev. 1, 6 (1994) ("Conference") ("[W]hat you have in Shaw is an irresolute standard . . . [T]he contours of the new principle are neither explicated in the opinion nor are they intuitively obvious from American political experience"); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483, 586 (1993) ("[T]he decision will be controversial, in part because it is bereft of virtually any guidance as to how the elusive principles that underlie its holding are to be turned into an administrable set of standards").

[7] Katharine I. Butler, *Symposium: Voting Rights After Shaw v. Reno: Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?*, 26 Rutgers L. J. 595, 599 (1995).

[8] T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after Shaw v. Reno*, 92 Mich. L. Rev. 588, 603-18 (1993). Professors Aleinikoff and Issa-

created a theory to justify the majority's apparent reliance on the bizarre shapes of the challenged districts.[9] One issue on which commentators did agree is that the Court's decision in *Shaw* would lead to a significant amount of litigation.[10]

B. *Miller v. Johnson* Held that Districts Based Predominantly on Race Are Unconstitutional Regardless of the Shape of the Districts

Two years later, the Supreme Court set forth a new "predominance" standard and clarified that *Shaw* claims are not limited to bizarre districts. *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995). After observing that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts," *id.* at 911, 115 S. Ct. at 2485-86, the five-member majority described the showing necessary to succeed in bringing a *Shaw* claim:

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charoff set forth the following possible interpretations of *Shaw*: (1) the Court intended merely to alert state legislatures to be aware of the Equal Protection Clause when redistricting, and has little interest in developing or explaining the new doctrine; (2) the Court applied ordinary equal protection rules and will eventually apply strict scrutiny even to non-bizarre districts; or (3) the Court's concern centers upon the excessive use of race in districting decisions.

[9] Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 Mich. L. Rev. 652, 663 (1993) ("'Ugliness,' it seems, is the provisional name given to the problem. It is an impulse in search of a theory. The theory follows.")

[10] *See, e.g.*, Emily Calhoun, *Essay: Shaw v. Reno: On the Borderline*, 65 U. Colo. L. Rev. 137, 148 (1993) ("[B]y not clearly articulating the limited basis for its holding, the majority opened up the possibility of challenges to many majority-minority districts across the country") (footnote omitted); *Conference*, *supra* note 6, at 27 (stating that the Court has "invite[d] a second round of political agitation except this time in the federal courts").

> "The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations."

Id. at 916, 115 S. Ct. at 2488. In a concurring opinion, Justice O'Connor expressed her view that this new standard is "a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices." *Id.* at 928, 115 S. Ct. at 2497 (O'Connor, J., concurring).

Although the Court's new standard was applied without great difficulty by lower courts,[11] scholars vehemently disagreed as to whether *Miller* confused or clarified the Court's earlier pronouncements in *Shaw*.[12] A number of

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[11] *Johnson v. Miller*, 929 F. Supp. 1529, 1547-60 (S.D. Ga. 1996); *King v. State Bd. of Elections*, No. 95 C 827, 1996 U.S. Dist. LEXIS 3195, at *45-56, *70-90 (N.D. Ill. Mar. 7, 1996), *vacated and remanded*, —— U.S. ——, 117 S. Ct. 429 (1996); *Hays v. Louisiana*, 936 F. Supp. 360, 367-69 (W.D. La. 1996); *Johnson v. Mortham*, 915 F. Supp. 1529, 1545-46, 1550-51 (N.D. Fla. 1995).

[12] *Compare* Judge David B. Sentelle, Racial Gerrymandering, Address Before the Federalist Society of the Columbus School of Law at The Catholic University of America (Nov. 1, 1995), *in* 45 Cath. U. L. Rev. 1249, 1249 (1996) (discussing "what little, and I think it is little . . . Miller v. Johnson . . . adds to the Shaw pronouncement") *and* Katharine I. Butler, *Affirmative Racial Gerrymandering: Rhetoric and Reality*, 26 Cumb. L. Rev. 313, 317 (1996) ("When the dust stirred by commentators settles, Shaw and Miller are revealed as unremarkable decisions") *with* Samuel Issacharoff, *Racial Gerrymandering in a Complex World: A Reply to Judge Sentelle*, 45 Cath. U. L. Rev. 1257, 1263 (1996) ("Shaw and Miller have caused a tremendous amount of confusion both in the courts and among the various federal and state actors who oversee the

commentators opined that the new standard was not manageable or workable,[13] and others expressed concern that the uncertainty in the law would encourage litigation[14] and cause problems for state legislators seeking to comply with the law.[15]

One particular area of disagreement centered upon the meaning of the term "predominance," upon which *Miller* based its new standard. Paul L. McKaskle, *The Voting Rights Act and the "Conscientious Redistricter"*, 30 U.S.F.

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process of redistricting") *and* Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 Cumb. L. Rev. 287, 287 (1996) ("Miller v. Johnson . . . further unsettled the already unclear roadmap set out in Shaw v. Reno") *and* Laughlin McDonald, *Can Minority Voting Rights Survive Miller v. Johnson?*, 1 Mich. J. Race & L. 119, 143 (1996) ("In Miller . . . the Court went far beyond the rule it appeared to adopt in Shaw, and added further confusion to the law of redistricting").

[13] Karlan, *supra* note 12, at 299 ("[T]he Court has yet to discover, or at least to articulate in a fashion it thinks the lower courts can apply, a manageable standard for deciding when race-conscious districting is permissible"); McDonald, *supra* note 12, at 145 ("The difficulty in applying Miller is evident from the sharp disagreement among the members of the Court").

[14] Charles S. Bullock, III, *Winners and Losers in the Latest Round of Redistricting*, 44 Emory L.J. 943, 967 (1995) ("It seems likely . . . that frequent litigation will be necessary to clarify when race has been the dominant factor as opposed to simply one of a multitude of considerations").

[15] *Id.* ("While Justice Kennedy's opinion in Miller goes beyond the emphasis on shape . . . legislators and independent commissions responsible for crafting districts still lack clear judicial guidance"); Frank R. Parker, *Factual Errors and Chilling Consequences: A Critique of Shaw v. Reno and Miller v. Johnson*, 26 Cumb. L. Rev. 527, 535 (1996) ("We have discussed the damaging impact on state legislatures, who now don't know what to do"). As noted by one commentator, "several states have become too politically paralyzed to redistrict at all; instead they have defaulted the task to federal courts." Richard H. Pildes, *Group Conflict and the Constitution: Race, Sexuality, and Religion: Principled Limitations on Racial and Partisan Redistricting*, 106 Yale L.J. 2505, 2508 & n.11 (1997).

L. Rev. 1, 47 n.233 (1995) (arguing that "predominant" can be defined alternatively as (1) more prominent than other factors, (2) given more than half of the weight given to all factors, or (3) given a substantial majority of such weight). Whereas one commentator argued that the predominance standard sets forth a simple "but-for" test,[16] another argued that racial considerations never "predominate" over considerations such as equipopulousity, partisan advantage and incumbent protection.[17] Concerns also were raised regarding the workability of this new standard.[18] Regardless of the confusion among scholars, however, lower courts applied the new standard without noticeable difficulty. *Supra* note 11.

C. *Shaw v. Hunt* and *Bush v. Vera* Have Caused Confusion Regarding the Miller Standard

Understanding of the *Miller* standard simultaneously was supported and impaired by two decisions issued by this Court on June 13, 1996: *Shaw v. Hunt*, —— U.S. ——, 116 S. Ct. 1894 (1996) ("*Shaw II*"); *Bush v.*

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[16] Richard Briffault, *Race and Representation After Miller v. Johnson*, 1995 U. Chi. Legal F. 23, 50-51.

[17] Karlan, *supra* note 12, at 302.

[18] *Id.* at 303 n.91 ("The Court's analysis reflects a naive assumption that close inquiry into the apportionment process will identify a single, predominant, but-for cause"); Pildes & Niemi, *supra* note 6, at 585 ("Searching for 'the reason' or 'the dominant reason' behind a particular district's shape is often like asking why one year's federal budget is at one level rather than another"). These concerns also have been expressed by Members of this Court. *Abrams v. Johnson*, —— U.S. ——, 117 S. Ct. 1925, 1949 (1997) (Breyer, J., dissenting) ("In other cases dissenting judges have expressed concerns that the Court's holdings and particularly its test—'predominant racial motive'—would prove unworkable . . . . This suit exacerbates those concerns"); *Bush*, 116 S. Ct. at 1978 (Stevens, J., dissenting) ("Of course, determining the 'predominant' motive of the Texas Legislature is not a simple matter"); *id.* at 2004-06 (Souter, J., dissenting) (opining that the predominance standard is unworkable).

Vera, —— U.S. ——, 116 S. Ct. 1941 (1996). Read together, these decisions reveal deep and ever-widening divisions on the Court regarding the proper standard to be applied to *Shaw* claims.

In *Shaw II*, a five-member majority of the Court held that the challenged districts were unconstitutional, reiterating the *Miller* standard without noticeable alteration. In *Bush*, however, a divided Court issued six opinions, none of which were joined by more than three Justices, and two of which appeared to depart from *Miller*. In the plurality opinion, Justice O'Connor reiterated the *Miller* standard but seemed to add a requirement that traditional districting principles be neglected. *Bush*, 116 S. Ct. at 1953 ("[T]he neglect of traditional districting criteria is merely necessary, not sufficient.") More confusion was added by Justice O'Connor's concurrence: "Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply." *Id.* at 1969. The fact that *Shaw II* and *Bush* were decided on the same day and yet contained irreconcilable views of the *Miller* standard signaled that the Court is divided as to the legal standards governing *Shaw* claims.

Lower courts after *Shaw II* and *Bush* have been divided as to whether to apply the original *Miller* standard or the more stringent standard described in *Bush*. Three courts, including the District Court in the case *sub judice*, have applied the standard described in *Bush*. *Quilter v. Voinovich*, Case No. 5:91CV-2219 (N.D. Ohio Aug. 22, 1997), App. 1a at 16a, 21a; *Theriot v. Parish of Jefferson*, 966 F. Supp. 1435, 1447 (E.D. La. 1997); *Dillard v. City of Greensboro*, 946 F. Supp. 946, 952, 955 (M.D. Ala. 1996). A majority of courts have adhered to the original *Miller* standard. *Stovall v. City of Cocoa*, 117 F.3d 1238, 1243 (11th Cir. 1997); *Goosby v. Town Bd. of Hempstead*, No. 88-CV-2453 (JG), 1997 U.S. Dist. LEXIS 16427, at *10 (E.D.N.Y. Oct. 20,

1997); *Diaz v. Silver*, No. 95-CV-2591, 1997 U.S. Dist. LEXIS 2068, at *65-96 (E.D.N.Y. Feb. 26, 1997), *aff'd mem.*, No. 92 CR 1064, 1997 U.S. LEXIS 4563 (N.D. Ill. Apr. 9, 1997); *Moon v. Meadows*, 952 F. Supp. 1141, 1145-49 (E.D. Va. 1997), *petition for cert. filed*, May 6, 1997; *Smith v. Beasley*, 946 F. Supp. 1174, 1206-07 (D.S.C. 1996). Nevertheless, the Court's failure to agree upon the *Shaw* standard has added troubling uncertainty to an already confusing area of the law.[19]

Not surprisingly, commentators have expressed considerable concern over the effects of *Shaw II* and *Bush* on the state of the law. Karlan & Levinson, *supra* note 19, at 1214 n.65 ("The fractured opinions in *Vera* remuddy the waters *Miller* sought to clear"); Pildes, *supra* note 15, at 2505 ("Three years after recognizing a new cause of action for racial redistricting in *Shaw v. Reno*, the Supreme Court's voting rights jurisprudence still teeters on the brink of legal incoherence and political chaos") (footnote omitted). Therefore, the constitutional claim first announced in *Shaw* is in great need of additional clarification by this Court prior to the year 2000 decennial census.[20]

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[19] *See* Pamela S. Karlan & Daryl J. Levinson, *Race-Based Remedies: Reshaping Remedial Measures: the Importance of Political Deliberation and Race-Conscious Redistricting: Why Voting Is Different*, 84 Calif. L. Rev. 1201, 1226 (1996) ("[T]he Supreme Court now asks the impossible of the lower courts.")

[20] As recently argued by Justice Souter, the Court has an obligation to clarify the nature of this new *Shaw* claim and identify its governing legal standards:

> "When the Court devises a new cause of action to enforce a constitutional provision, it ought to identify an injury . . . and it should describe the elements necessary and sufficient to make out a claim. Nothing less can give notice to those whose conduct may give rise to liability or provide standards for courts charged with enforcing the Constitution."

Bush, 116 S. Ct. at 1997-98 (Souter, J., dissenting). *Accord Leading Cases*, 110 Harv. L. Rev. 185, 190 (1996) ("When the Court identifies a new constitutional injury by the slimmest of possible

III. UNDER *SHAW v. RENO* AND ITS PROGENY, STRICT SCRUTINY IS TRIGGERED BY DIRECT EVIDENCE THAT A DISTRICT WAS DRAWN PRIMARILY ON THE BASIS OF RACE EVEN IF IT COMPLIES WITH TRADITIONAL DISTRICTING PRINCIPLES, AND THE DISTRICT COURT WRONGLY HELD THAT STRICT SCRUTINY WAS NOT TRIGGERED IN THIS CASE

The District Court held that although race undeniably was a substantial factor used in drawing the challenged districts, Appellants somehow failed to prove that traditional districting principles were subordinated to race since the districts were compact, contiguous and respected political subdivisions, and only arguably failed to comply with one traditional districting principle.[21] App. 1a at 31a-34a. In so holding, the District Court incorrectly utilized a legal standard (not endorsed by this Court) that ignores *Miller*'s predominance standard. The District Court also ignored holdings in *Miller* and *Shaw II* that districts drawn primarily on the basis of race, such as the challenged districts here, will trigger strict scrutiny *even if* they coincidentally comply with traditional districting principles. Finally, the standard created by the District Court is internally inconsistent and impossible to apply.

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margins, it has a responsibility to devise a test that clearly identifies when the injury has occurred . . . ."); Pildes, *supra* note 15, at 2508 ("Unless the Court quickly brings more principled legal ordering to the framework of racial redistricting, political institutions will become the site for the most divisive racial and ethnic confrontations seen in many years"). This case affords the Court an opportunity to provide this clarification prior to the next round of redistricting.

[21] Appellants showed that the challenged district failed to comply with a state constitutional requirement that existing "district boundaries . . . shall be adopted to the extent reasonably consistent" with other requirements. Ohio Constitution, Article XI, § 7(D). The District Court declined to decide whether this criterion had been complied with and held only that this principle was not subordinated to race. App. 31a-32a.

For these reasons, the District Court's decision should be reversed.

A. The District Court's Newly-Created Legal Standard Is Erroneous and Unsound

In formulating its legal standard, the District Court struggled to guess how Justice O'Connor might decide this case rather than apply this Court's actual holdings in *Miller* and *Shaw II*.[22] After reviewing this Court's opinions in *Shaw I*, *Miller*, *Shaw II* and *Bush*, the District Court discussed policy considerations that it believed supported Justice O'Connor's views, App. 18a-21a, and concluded:

> "As we apply the threshold analysis developed by the Supreme Court in *Shaw* cases, we are mindful of the dangers that a low threshold (easily invoking strict scrutiny) poses for states. We therefore follow Justice O'Connor's lead in applying a demanding threshold that allows states some degree of latitude to consider race in drawing districts. While adherence to traditional districting principles does not automatically create a 'safe harbor' from strict scrutiny, we will not apply strict scrutiny without the 'necessary' showing by the plaintiffs that the defendant neglected traditional districting criteria and that neglect is predominantly due to the misuse of race."

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[22] Indeed, the District Court admitted as much in its opinion:

> "We pay particular attention to Justice O'Connor's views in this area because she has played an important role in every case relevant to the threshold analysis. She authored the majority opinion in *Shaw I* and the plurality opinion in *Bush*, and she provided the deciding vote in *Miller* and *Shaw II*. Her concurring opinions in *Miller* and *Bush* shed significant light on her views of the role of strict scrutiny and of the height of the threshold. Given Justice O'Connor's pivotal role in *Shaw* claim cases, those separate opinions carry special weight."

App. 13a n.5.

App. 21a. This standard, driven by Justice O'Connor's concurring opinion in *Miller*,[23] ignores this Court's statements of the governing legal standard in *Miller* and *Shaw II* and instead cobbles together conflicting statements set forth in Justice Ginsburg's dissenting opinion in *Miller*,[24] the plurality opinion in *Bush*,[25] and Justice O'Connor's concurring opinion in *Bush*.[26] The result, not surprisingly, is a veritable mudpie, both erroneous and fundamentally unsound.

1. *The Standard Fails to Incorporate the Court's Holdings*

The District Court's newly-created legal standard is erroneous because it wholly ignores the predominance standard set forth in *Miller*, relying instead upon the individual views of Justice O'Connor that suggest a more stringent showing than that endorsed in *Miller* and *Shaw II*. It is inappropriate for a lower court to "guess" which way the law will develop in lieu of applying existing law endorsed by the Court. Thus, the District Court overstepped its authority by applying a legal standard that it believes someday may be adopted, instead of applying existing law.

The District Court's misguided approach suggests that the divisions on the Court, and resulting uncertainty in

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[23] 515 U.S. at 928, 115 S. Ct. at 2497 (O'Connor, J., concurring) (describing her view that the predominance standard is "a demanding one").

[24] 515 U.S. at 949, 115 S. Ct. at 2507 (Ginsburg, J., dissenting) ("Genuine attention to traditional districting practices and avoidance of bizarre configurations seemed, under *Shaw*, to provide a safe harbor. . . . In view of today's decision, that is no longer the case.")

[25] 116 S. Ct. at 1953 ("the neglect of traditional districting criteria is merely necessary, not sufficient").

[26] 116 S. Ct. at 1969 ("Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply") (emphasis in original).

the law, will encourage lower courts to "predict" the development of the law rather than apply the existing law. Since this guessing inevitably will lead to inconsistent results and even greater uncertainty, the District Court's opinion demonstrates that the constitutional claim announced in *Shaw* requires additional clarification by this Court.

2. *The Standard Ignores Contrary Holdings by this Court in* Miller *and* Shaw II

The District Court's legal standard also is erroneous because it ignores this Court's holdings in *Miller* and *Shaw II* that districts drawn primarily on the basis of race, such as the challenged districts here, will trigger strict scrutiny *even if* they coincidentally comply with traditional districting principles.

Miller clarified that *Shaw* plaintiffs can rely either upon circumstantial evidence (shape) *or* upon direct evidence of legislative intent to trigger strict scrutiny. *Miller*, 515 U.S. at 913, 115 S. Ct. at 2486. The Court observed that conspicuous patterns of discrimination "are rare, and are not a necessary predicate to a violation of the Equal Protection Clause." *Id.* at 913-14, 115 S. Ct. at 2487. These statements mean that, as observed by Justice Ginsburg, compliance with traditional districting principles does not provide a "safe harbor" from strict scrutiny. *Id.* at 949, 115 S. Ct. at 2507 (Ginsburg, J., dissenting).

This holding was reaffirmed in *Shaw II*, which refuted Justice Stevens' concern that *Miller* allows states to "avoid strict scrutiny by complying with traditional districting principles." 116 S. Ct. at 1914 (Stevens, J., dissenting). Writing for the majority, Chief Justice Rehnquist stated that this position is incorrect:

> "In his dissent, Justice Stevens argues that strict scrutiny does not apply where a state 'respects' or 'compl[ies] with traditional districting principles.' . . . That, however, is not the standard announced and

> applied in Miller, where we held that strict scrutiny applies when race is the 'predominant' consideration in drawing the district lines such that 'the legislature subordinate[s] race-neutral districting principles . . . to racial considerations.' . . . The Miller standard is quite different from the one that Justice Stevens advances. . . ."

Id. at 1901 (footnote and citations omitted). *Shaw II* explained that, although the state had complied with some traditional districting principles, this "does not in any way refute the fact that race was the legislature's predominant consideration," since these other principles were considered "only after the race-based decision had been made," and since "[r]ace was the criterion that, in the State's view, could not be compromised." *Id.* The District Court's legal standard is fundamentally unsound because it wholly fails to incorporate these holdings.[27]

3. *The Standard Is Internally Inconsistent*

The District Court's formulation of the governing legal standard also is unsound because it is internally inconsistent and impossible to apply. Inexplicably, the District Court simultaneously held that although adherence to traditional districting principles will not create a "safe harbor" from strict scrutiny, strict scrutiny will be triggered only if the defendants neglected traditional districting criteria. App. 21a. Otherwise stated, whereas compliance

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[27] The District Court attempted to justify this admitted neglect by opining that this Court could not have meant that one consideration (*i.e.*, race) predominated merely because it was considered "first" and because other considerations did not come into play until "after" the race-based decision had been made, since "[a] literal chronological reading would substitute an overly formalistic approach in place of the Court's 'predominant factor' analysis." App. 17a n.7. However, since the District Court's argument that this Court's usage of the term "first" refers to prioritization rather than to chronological order is both tautological (*i.e.*, if race was given the highest priority, then it must be the predominant factor) and nonsensical, it should be rejected by this Court.

with traditional districting principles will not prevent strict scrutiny from being triggered, traditional districting principles *must* be neglected (*i.e.*, not complied with) in order to trigger strict scrutiny. Since the latter statement contradicts and obliterates the former statement, the resulting "standard" is, at best, meaningless. Given that the law in this area already is uncertain, the District Court's confusing addition to *Shaw* jurisprudence should be rejected by the Court.

B. The Erroneous Standard Led to an Erroneous Result

In its opinion, the District Court incorporated findings of fact from its prior decision applying the *Miller* standard. *Quilter v. Voinovich*, Case No. 5:91CV-2219 (N.D. Ohio Aug. 22, 1997), App. 1a at 3a (adopting paragraphs 2, 3, 5-10 and portions of paragraph 11 of *Quilter v. Voinovich*, 912 F. Supp. 1006, 1023-26 (N.D. Ohio 1995), App. 63a at 89a-95a). In that opinion, the District Court held, based on these facts, that "race was the predominant motivating factor in the Defendants' creation of House districts 21, 22, 30, 31, 38, 39, 44, and 49." *Quilter*, 912 F. Supp. at 1027, App. 97a. Since this conclusion is not altered by this Court's decisions in *Bush* and *Shaw II*, the District Court's opinion should be reversed.

The direct evidence that the Board, and Tilling, primarily were motivated by race in drawing district lines is overwhelming. *Supra* at 3-4. Based upon that evidence, the District Court found that in five counties the Board deliberately drew district lines purportedly to enhance the possibility of electing or to guarantee the election of new black candidates. *Quilter*, 912 F. Supp. at 1024-25, App. 63a at 91a-94a. This direct evidence demonstrates that race was the predominant, motivating factor in the redistricting of the challenged eight districts, and nothing in *Shaw II* or *Bush* justifies a reconsideration

of the District Court's factual finding that race predominated.[28]

Considered together with the findings of fact adopted by the District Court, the facts highlighted by Judge Jones show that "race was the predominant motivating factor in the Defendants' creation" of the challenged districts, *Quilter*, 912 F. Supp. at 1027, particularly since race was considered "first", prior to consideration of race-neutral traditional districting principles. *Shaw*, 116 S. Ct. at 1901. Since *Shaw II* and *Bush* cannot alter these findings of fact, the District Court's decision should be reversed.

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[28] Further examples of such direct evidence are set forth in the dissenting opinion of Judge Nathaniel R. Jones, in which he pointed out:

> "In the case at bar, the record is replete with evidence that race was the predominant motivation of the state officials when they drew the districts at issue. In fact, there is substantial evidence in the record indicating that back room decisions such as those outlawed in *Gomillion v. Lightfoot*, [364 U.S. 339, 81 S. Ct. 125 (1960)] have made a mockery of substantial racial progress with respect to voting patterns in the districts at issue."

App. 1a at 53a. Judge Jones cited Tilling's testimony,

> "without equivocation, that his first goal was to gather data on his computer on black populations and black voting age population . . . . He then drew the black districts first by aggregating black populations on his computer and drawing lines around those populations."

App. 54a. Judge Jones also described a letter that "declares in clear terms that when the districting board had to choose between race and traditional districting principles, they chose race." *Id.* He also provided detailed descriptions of the impermissible use of race in four of the eight challenged districts. App. 55a-58a.

IV. IN REGARD TO THE ISSUE OF STANDING, THIS COURT SHOULD FURTHER CLARIFY THE CONNECTION BETWEEN THE INJURY SUFFERED AND THOSE SPECIFIC PERSONS WHO HAVE STANDING TO ASSERT A *SHAW* CLAIM

The harms inflicted by racial gerrymandering have been well described by the Court. In *Shaw*, the Court identified three distinct types of harm caused by racial gerrymandering. First, it stigmatizes people on the basis of their race and constitutes an impermissible racial stereotype that "reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. 630, 646, 113 S. Ct. 2816, 2827 (1993). Second, it sends an "equally pernicious" message to elected representatives "that their primary obligation is to represent only the members of that [racial] group, rather than their constituency as a whole." *Id.* at 648, 113 S. Ct. at 2827. Third, its emphasis on racial classifications "may balkanize us into competing racial factions" and undermine our national aspiration to have a political system "in which race no longer matters." *Id.* at 657, 113 S. Ct. at 2832.

Two years later, the Court reiterated that race-based gerrymandering is injurious because it stereotypes individuals on the basis of their race. *Miller v. Johnson*, 515 U.S. 900, 913, 115 S. Ct. 2475, 2486 (1995). On the same day, the Court noted that racial gerrymandering causes stigmatic and representational harms. *United States v. Hays*, 515 U.S. 737, 745, 115 S. Ct. 2431, 2436 (1995). Most recently, a plurality of this Court emphasized the harms caused by racial stereotyping and described those harms as "expressive" harms. *Bush v. Vera*, —— U.S. ——, 116 S. Ct. 1941, 1964 (1996). Thus, the Court has repeatedly identified the *nature* of the constitutional harms.[29]

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[29] As noted by the District Court, a number of commentators have argued that there are conceptual problems with the Court's

What the Court has yet to do is explain how these harms correlate to existing rules of standing. Notwithstanding the Court's bright-line rule that *Shaw* plaintiffs lack standing unless they reside in the challenged district or show that they have been personally subjected to a racial classification, *Hays*, 515 U.S. at 745, 115 S. Ct. at 2436, the Court has not clarified the connection between this standing test and the particular harms inflicted by *Shaw* claims. Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 Mich. J. Race & L. 47, 63 (1996) ("this peculiar standing doctrine does not elucidate a coherent view of harm"); Karlan, *supra* note 12, at 294 ("There is no necessary causal connection between racial classification of the individual plaintiff and these representational harms"); Pildes, *supra* note 15, at 2539 (due to the nature of the identified expressive harms, "the standing rules that attach to Shaw claims . . . are difficult to justify").

Until the Court addresses this issue, litigants and courts will lack a conceptual framework to help them understand and resolve new arguments related to standing, such as those asserted by the Appellants herein. Accordingly, Appellants urge this Court to clarify further the connection between the harms caused by racial gerrymandering and applicable rules of standing.

V. PERSONS RESIDING IN AN ALLEGEDLY UNCONSTITUTIONAL DISTRICT, AS WELL AS MINORITY MEMBERS OF THE APPORTIONMENT BOARD, HAVE STANDING TO CHALLENGE THE ENTIRE DISTRICTING PLAN

The District Court held that Appellants lack standing to challenge four districts in which no Appellant lives.

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identification of harms and its standing doctrine. App. 1a at 6a-7a n.2. Since a detailed examination of these arguments would go beyond the limited scope of this jurisdictional statement, it will not be included here.

App. 1a at 7a-10a. This conclusion should be reversed for two separate reasons.

First, Appellants who reside in four of the challenged districts have standing to challenge the *entire districting plan*, and are not limited to challenging their own individual districts. On the basis of this Court's articulation of the harm caused by racial gerrymandering, *supra* Section IV, a plaintiff who resides in a gerrymandered district *is injured* by the gerrymander and, therefore, has standing to challenge *the plan* that created the injurious gerrymander because it is the plan that is unconstitutional, not the district. *United States v. Hays*, 515 U.S. 737, 746, 115 S. Ct. 2431, 2437 (1995) ("Appellees insist that they challenged Act 1 in its entirety, not District 4 in isolation. . . . Only those citizens able to allege injury . . . may bring such a challenge"). Accordingly, those Appellants who reside in the challenged districts have standing to challenge the plan in its entirety.

Second, two of the Appellants are dissenting members of Ohio's Apportionment Board. Under Ohio's Constitution, Article XI, § 1, these Appellants are responsible for creating a valid redistricting plan. Since the majority members of the Board created an unlawful redistricting plan, the dissenting Board members have suffered a cognizable injury as a result of being unable to fulfill their duty to create legal voting districts. Therefore, the dissenting Board members have standing to challenge the redistricting plan in its entirety. *Coleman v. Miller*, 307 U.S. 433, 438, 59 S. Ct. 972, 975 (1939) (state legislators have standing to challenge state court ruling invalidating statutes that the legislators sought to enforce: "We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes."); *Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974) ("[A]n individual legislator has standing to

protect the effectiveness of his vote.")[30] For these reasons, the District Court erred in holding that Appellants lacked standing to challenge four of the eight districts, and this holding should be reversed.

CONCLUSION

For the reasons set forth above, this Court should either:

(1) summarily reverse the judgment below and remand for entry of judgment in Appellants' favor in accordance with the District Court's prior opinion in *Quilter v. Voinovich*, 912 F. Supp. 1006 (N.D. Ohio 1995), App. 63a;

or

(2) note probable jurisdiction and reverse the decision of the District Court.

Respectfully submitted,

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[30] This standing argument is limited in its effect to states that, like Ohio, utilize apportionment boards to formulate redistricting plans.

APPENDICES

APPENDICES

APPENDIX A

[Filed Aug. 22, 1997]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

OPINION

BEFORE: JONES and MOORE, Circuit Judges, and DOWD, District Judge.

Karen Nelson Moore, Circuit Judge. The question before this court is whether the Ohio Apportionment Board's consideration of race in its 1992 redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment. We hold that because the plaintiffs have failed to make a threshold showing that the defendants subordinated traditional districting principles to consideration of race, strict scrutiny of the challenged districts is not applicable. Applying rational basis scrutiny, we conclude that the plan does not violate the Equal Protection Clause.

I. BACKGROUND AND PROCEDURAL HISTORY

This case is before this court on remand from the United States Supreme Court. Because we focus on application of

the legal analysis outlined by the Supreme Court in recent cases, we will not revisit the facts and procedural history of this case in detail. The tortuous history of this litigation, which first came to this court in the form of a suit based on vote dilution and population deviation, was more thoroughly recounted in a previous opinion of this court. *See Quilter v. Voinovich*, 912 F. Supp. 1006, 1011-14 (N.D. Ohio 1995).

This litigation arose from the reapportionment of Ohio's electoral districts following the 1990 federal census. The plaintiffs include the Democratic members of the Republican-dominated Apportionment Board; the defendants are the Republican members of the Board and James R. Tilling, who drew the majority's plan. After the Supreme Court reversed this court's judgment for the plaintiffs on claims of vote dilution and remanded for further proceedings on a Fourteenth Amendment claim involving population deviation, *see Voinovich v. Quilter*, 507 U.S. 146 (1993), this court permitted the plaintiffs to amend the complaint in light of the then-recent decision in *Shaw v. Reno*, 509 U.S. 630 (1993) (*"Shaw I"*), which recognized an equal protection claim of racial gerrymandering. *Quilter v. Voinovich*, 157 F.R.D. 36 (N.D. Ohio 1994). This court held in favor of the defendants on the population deviation issue, *Quilter v. Voinovich*, 857 F. Supp. 579 (N.D. Ohio 1994), but held in favor of the plaintiffs on the *Shaw* claims. *Quilter v. Voinovich*, 912 F. Supp. 1006 (N.D. Ohio 1995). The Supreme Court vacated the latter opinion and remanded for further consideration in light of the recent opinions in *Bush v. Vera*, —— U.S. ——, 116 S. Ct. 1941 (1996), and *Shaw v. Hunt*, —— U.S. ——, 116 S. Ct. 1894 (1996) (*"Shaw II"*). *Voinovich v. Quilter*, 116 S. Ct. 2542 (1996).

On remand, we have limited our consideration to the effect of *Bush* and *Shaw II* on our previous analysis and holding. We have not considered any new evidence; we

therefore readopt our previous factual findings, as outlined in the vacated opinion, to the extent that they are findings of fact and not conclusions of law regarding the "predominant factor" analysis, and to the extent that they are relevant to the threshold analysis. Specifically, we readopt ¶¶ 2, 3, and 5-10. *See* 912 F. Supp. at 1023-25. As to ¶ 11, we readopt the description of Tilling's notes and the finding that they are "probative" of the defendants' consideration of race, but we do not adopt the characterization of that consideration as "predominant" under the now-relevant Supreme Court standards. We need not readopt our previous findings of fact or conclusions of law as to the analysis under strict scrutiny, in which we held that the defendants did not have a compelling state interest to justify race-based redistricting. *See* 912 F. Supp. at 1027-30 (¶¶ 15-22). We see nothing in *Bush* or *Shaw II* that would change our previous analysis of compelling interest, but our holding that strict scrutiny is not applicable to the plan renders the compelling interest analysis unnecessary.

II. STANDING

Although we did not previously address the plaintiffs' standing to challenge the apportionment plan or certain districts, the Supreme Court's clear and limited definition of standing in *Shaw II* prompts us to consider not only whether the plaintiffs have standing, but also the scope of that standing. Federal courts have "an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *United States v. Hays*, 515 U.S. 737, 115 S. Ct. 2431, 2435 (1995) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1991) (citations omitted)) (alteration in original).

The Supreme Court's treatment of standing in *Shaw* claim cases has not been entirely consistent. *Shaw I* itself appeared to be based on broadly conceptualized harms,

focusing on the stigmatization of individuals because of their race and on potential "representational harms" resulting from representation only of members of the majority racial group in a district.[1] *See Hays*, 115 S. Ct. at 2436; *Shaw I*, 509 U.S. at 643, 648; Mark S. Nagel, Recent Developments, 19 HARV. J.L. & PUB. POL'Y 188, 196 (1995). *See also* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 515-16 (1993) (commenting on "just how nonindividualized . . . the expressive harm central to *Shaw*" was, and noting the Court's failure in *Shaw I* to address issues of standing); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287, 290 (1995-1996) (noting *Shaw*'s " 'complete disregard for standing requirements' ") (citation omitted); Jeffrey L. Fisher,

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[1] The message that [racially gerrymandered] districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.

Shaw I, 509 U.S. at 648. But this conception of harm arguably is based on an assumption that *Shaw I* rejected:

> Although the *Shaw* Court attributed representational harms solely to a message sent by the legislature's action, those harms can only come about if the message is received—that is, first, if all or most black voters support the same candidate, and, second, if the successful candidate ignores the interests of her white constituents. Respondents' standing, in other words, ultimately depends on the very premise the Court purports to abhor: that voters of a particular race " 'think alike, share the same political interests, and will prefer the same candidates at the polls.' "

Miller v. Johnson, 515 U.S. 900, 115 S. Ct. 2475, 2497-98 (1995) (Stevens, J., dissenting) (quoting *Miller* majority, 115 S. Ct. at 2486 (quoting *Shaw I*, 509 U.S. at 647)).

Note, *The Unwelcome Judicial Obligation to Respect Politics in Racial Gerrymandering Remedies*, 95 MICH. L. REV. 1404, 1416 (1997) ("[S]uch a speculative view of harm [as *Shaw*'s representational harm], however, has never been enough to satisfy Article III's standing requirement."). In *Hays*, the Court rejected the argument that "anybody in the State" could challenge an allegedly racially gerrymandered district, holding instead that a plaintiff who does not reside in the challenged district must present "specific evidence" that he or she "has personally been subjected to a racial classification." 115 S. Ct. at 2436. The Court explained that "[v]oters in [racially gerrymandered] districts may suffer the special representational harms racial classifications can cause in the voting context. On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms . . . ." *Id.*

In another decision issued on the same day as *Hays*, however, the Court appeared to focus not on the representational harms to the white plaintiffs who challenged a majority-minority district, but on the general, expressive harms that result from government use of racial classifications. *See Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475, 2486 (1995) (emphasizing the offensiveness of such use); *see also* Karlan, *supra*, at 288 (commenting on "*Miller*'s apparent abandonment of any requirement that plaintiffs prove 'representational harms.' ").

In *Shaw II*, the *Shaw I* suit that spawned this line of cases returned to the Supreme Court, which then applied the *Hays* rule and cemented the test of standing to bring a *Shaw* claim: a plaintiff who resides in a particular district has standing to challenge the legislation that created that district; a plaintiff from outside the district does not have standing to challenge the legislation without specific evidence that he or she "personally has been subjected to a racial classification." 116 S. Ct. at 1900. The scope of

the standing is specific—the plaintiff's challenge is limited to the particular district on which standing is based:

> Two appellants, Ruth Shaw and Melvin Shimm, live in District 12 and thus have standing to challenge that part of Chapter 7 which defines District 12. The remaining appellants do not reside in District 1 [the other challenged district], however, and they have not provided specific evidence that they personally were assigned to their voting districts on the basis of race. Therefore, we conclude that only Shaw and Shimm have standing and only with respect to District 12.

Id. (citation and footnote omitted).[2]

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[2] Although the plaintiffs in the instant case concede, as they must, that the Supreme Court's clear enunciation of the standing rule in *Shaw II* is binding upon this court, they contend that the restriction of the scope of the challenge (i.e., a plaintiff has standing only to challenge the particular district on which standing is grounded) did not follow from *Hays* or *Miller*. We note, however, that neither of those cases presented this question clearly; neither case featured plaintiffs who resided in an allegedly gerrymandered district and who sought to challenge a districting plan as a whole. In *Hays*, the plaintiffs challenged Louisiana's districting legislation in its entirety, but the Court based its holding that they did not have standing on the fact that no plaintiff resided in the particular district they alleged had been racially gerrymandered; the opinion did not address whether a plaintiff who did reside in that district would have standing to challenge the entire state plan. 115 S. Ct. at 2437. In *Miller*, on the other hand, the plaintiffs challenged Georgia's Eleventh (congressional) District; all of the plaintiffs resided in that district and therefore had standing to challenge it.

Some commentators have suggested that the Supreme Court's development of standing in this area is conceptually flawed for a variety of reasons, including that a shift in emphasis from representational harms to expressive harms arguably undermines the justification for residence-based standing. *See, e.g.*, Nagel, *supra*, at 196 ("As announced in *Hays* and applied in *Miller*, the standing requirements for a *Shaw* claim are satisfied by a general allegation of state wrongdoing, without any showing of personal injuries and unsubstantiated by any evidence.") (footnote omitted). *See also* Karlan, *supra*, at 292 ("Despite its surface plausibility in limiting

In the present case, the plaintiffs have purported to challenge the Ohio Apportionment Board's plan as a whole; the previous, vacated opinion of this court held eight specific districts unconstitutional: House Districts ("HD") 21, 22, 30, 31, 38, 39, 44, and 49. The defendants concede that at least one plaintiff resides in HD 31, HD 39, HD 44, and HD 49, and challenge plaintiffs' stand-

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standing to voters within a challenged district, *Hays* rested on a series of illogical and constitutionally unacceptable premises. . . . [I]t is simply wrong to suppose that all individuals within a challenged district have suffered a racial classification."); *id.* at 296-97 ("The Court's nonchalance about standing conveys a central point about the wrongful districting cases: they really aren't individual rights lawsuits in the first place. Rather they concern the meaning of 'our system of representative democracy.'") (footnote omitted); Jack Pritchard, Casenote, United States v. Hays: *A Winnowing of Standing to Sue in Racial Gerrymandering Claims*, 47 MERCER L. REV. 955, 964 (1996) ("[T]here is no real difference between residents and nonresidents in reference to racially gerrymandered districts . . . . Those who reside outside the gerrymandered district may be harmed in the same manner and receive the same injuries as those who are residents of that district.") (footnotes omitted); Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47, 64 (1996):

> As the modern Court has noted, the racial gerrymandering cases resemble *Gomillion* in that the government drew boundary lines in order to include only a certain racial proportion. But in *Hays*, Justice O'Connor concluded that only the citizens within a district were presumptively injured, not those that were excluded, which is to say that the Whites in Tuskegee could sue but not the excluded Blacks. That reasoning simply fails to recognize that, in districting, a decision to include one kind of person is fundamentally also a decision to exclude other kinds of people.

(internal citation omitted) (referring to *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), in which the Court invalidated the State of Alabama's redrawing of the boundaries of Tuskegee, which excluded ninety-six percent of the city's black residents and almost no whites).

Regardless of its possible conceptual problems, however, we are bound by the Supreme Court's rule on standing in *Shaw* cases.

ing only as to HD 21, HD 22, HD 30, and HD 38. The plaintiffs have not presented specific evidence that any of them have personally been subjected to a racial classification in relation to these latter four districts, and they do not argue that basis for standing. Instead, they attempt to base their standing on alternative grounds which we hold are meritless.

First, the plaintiffs contend that the plaintiffs who were members of the Apportionment Board have standing as a result of "being unable to fulfill their duty to create legal voting districts"—i.e., legislator standing. Pls.' Mem. at 12. *See, e.g., Coleman v. Miller,* 307 U.S. 433 (1939); *Moore v. U.S. House of Representatives,* 733 F.2d 946 (D.C. Cir. 1984), *cert. denied,* 469 U.S. 1106 (1985); *Kennedy v. Sampson,* 511 F.2d 430 (D.C. Cir. 1974). A recent decision of the Supreme Court, however, suggests that legislator standing based on institutional injury, under *Coleman,* is limited to instances of vote nullification with regard to a specific legislative action. *Raines v. Byrd,* —— U.S. ——, 117 S. Ct. 2312 (1997). Moreover, rather than an improper procedure (as in *Coleman* and *Moore*) or an incursion by another branch of government (as in *Kennedy*), the plaintiffs' alleged injury in this case resulted from the majority's decision to choose a course of action that the outnumbered members thought to be unconstitutional. *Cf. Raines,* 117 S. Ct. at 2320 ("In the vote on the Line Item Veto Act, their votes were given full effect. They simply lost that vote."). Not only is the substance of the claimed injury distinguishable, but the precedent of granting the plaintiffs standing in this context would invite any legislator who was outvoted on a particular measure to bring a constitutional challenge to that measure merely because he or she had not prevailed. *Cf. Raines,* 117 S. Ct. at 2323 (Souter, J., concurring in the judgment) ("[H]arm to the[] interest in having government abide by the Constitution . . . would be shared to the same extent by the public at large and thus provide no basis for suit . . . .") (citations omitted).

Second, the Board member plaintiffs contend that they have standing under the doctrine of *jus tertii*. Pls.' Mem. at 13. This argument also fails, because the justification for third-party standing is not present here. Generally speaking, a plaintiff is permitted to assert the rights of a third party where the plaintiff has suffered his or her own injury-in-fact, there is a nexus between the right asserted and the relationship between the party and the third party, and the litigation will have a material impact on those third-party interests. *See generally United States Department of Labor v. Triplett*, 494 U.S. 715, 720-21 (1990); *Caplin & Drysdale v. United States*, 491 U.S. 617, 623 n.3 (1989); *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972). In this case, there is no "special" relationship between the Board members and the voters of Ohio that is comparable to the direct relationships between doctors and patients or lawyers and clients, or even vendors and customers (*see Craig v. Boren*, 429 U.S. 190, 194-97 (1976)). Any relationship between Board members and voters is too vague and general—and the defendants include the other Board members, who presumably have the same relationship with the voters, rather than some external entity that is impinging upon the asserted relationship. Furthermore, there is no obstacle to prevent the third parties from bringing their own claims; the question presented here could be raised by any voter from one of the contested districts.

In the alternative, plaintiffs request that this court "proceed to certify this action as a class action with respect to a subclass of voters who reside in the eight districts [at issue]." Pls.' Mem. at 14. The plaintiffs make no attempt to show that they can meet the presequisites stated in FED. R. CIV. P. 23(a). Given the Supreme Court's emphasis on treating each district individually, particularly with respect to standing, plaintiffs cannot demonstrate sufficient typicality of their claims. FED. R. CIV. P. 23(a)(3). We cannot subvert the Supreme Court's clear standing require-

ments by certifying a class to represent HD 21, HD 22, HD 30, and HD 38, when the plaintiffs do not allege that any current plaintiff individually could represent any of those districts.

We therefore hold that the plaintiffs have standing to challenge only HD 31, HD 39, HD 44, and HD 49.

III. THE *SHAW* CLAIM

A. The Application of Strict Scrutiny to Race-Based Districting

1. *Shaw v. Reno* (*Shaw I*)

The Supreme Court first recognized a cause of action under equal protection based on race-based districting in *Shaw I*. In that case, the Court held that the plaintiffs had stated a cognizable claim by alleging that reapportionment legislation, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 509 U.S. at 649. Such a claim was "analytically distinct" from a claim of vote dilution. *Id.* at 652.[3]

The Court did not, however, hold that strict scrutiny is necessarily triggered by governmental use of race:

> It is unnecessary for us to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged. Thus, we express no view as to whether "the

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[3] *Shaw* recognized a claim "analytically distinct" from a vote dilution claim. Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device "to minimize or cancel out the voting potential of racial or ethnic minorities," an action disadvantaging voters of a particular race, the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts.

Miller, 115 S. Ct. at 2485-86.

> intentional creation of majority-minority districts, without more," always gives rise to an equal-protection claim.

509 U.S. at 649. The Court nevertheless discussed how race-based redistricting might be shown; here, the Court acknowledged the fact of race-consciousness in the redistricting process, and suggested the role of traditional practices in avoiding strict scrutiny:

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. . . .
>
> . . . [Proof of a "racial gerrymander" could be made by showing that] a State concentrated a dispersed minority population in a single district by *disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions.* We emphasize that these criteria are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.

Id. at 646-47 (internal citation omitted) (second emphasis added). *See also id.* at 642 (characterizing the appellants' complaint as objecting to "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, *without regard for traditional districting principles* and without sufficiently compelling justification.") (emphasis added).[4]

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[4] It is worth noting that *Shaw I* involved a challenge to an oddly shaped district, where the shape of the district was itself the al-

2. *Miller v. Johnson*

Two years after *Shaw I*, the Court clarified the test for applying strict scrutiny to redistricting legislation, articulating the threshold that the Court has continued to apply. In *Miller*, the Court explained that bizarreness of a district's shape was not a prerequisite for strict scrutiny; rather, it was one type of evidence that a drawing of the district had been motivated by race. Bizarreness of shape "may be persuasive circumstantial evidence that race for its own sake, and *not other districting principles*, was the legislature's *dominant and controlling rationale* in drawing its district lines." 115 S. Ct. at 2486 (emphasis added). The Court went on to enunciate the threshold showing required of a *Shaw* plaintiff:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the *predominant factor* motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature *subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity*, [and] *respect for political subdivisions or communities defined by actual shared interests, to racial considerations.* Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has

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leged objective evidence of racial discrimination. In the present case, on the other hand, the shapes of the challenged districts are unremarkable, but the defendants admittedly considered race in drawing the districts. For that reason, *Shaw I* is not directly on point; we discuss it in some detail because it makes clear that traditional districting principles have played a significant role in the application of strict scrutiny since the conception of the *Shaw* claim.

> been gerrymandered on racial lines." These principles inform the plaintiff's burden of proof at trial.

Id. at 2488 (quoting *Shaw I*, 509 U.S. at 647) (emphases added) (internal citation omitted). *See also id.* at 2489 ("Although a legislature's compliance with 'traditional districting principles . . .' may well suffice to refute a claim of racial gerrymandering, appellants cannot make such a refutation where, as here, those factors were subordinated to racial objectives.") (internal citation omitted).

Justice O'Connor joined the opinion of the Court, but also wrote a separate concurring opinion [5]:

> I understand the threshold standard the Court adopts —"that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations[]"—to be a *demanding* one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in *substantial disregard* of customary and traditional districting practices. Those practices

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[5] We pay particular attention to Justice O'Connor's views in this area because she has played an important role in every case relevant to the threshold analysis. She authored the majority opinion in *Shaw I* and the plurality opinion in *Bush*, and she provided the deciding vote in *Miller* and *Shaw II*. Her concurring opinions in *Miller* and *Bush* shed significant light on her views of the role of strict scrutiny and of the height of the threshold. Given Justice O'Connor's pivotal role in *Shaw* claim cases, those separate opinions carry special weight. *See, e.g.*, Issacharoff & Goldstein, *supra*, at 60 (noting that Justice O'Connor provided "the indispensable fifth vote" in *Miller*, and stating that her separate concurrence "is widely viewed as an important limit on *Miller's* scope."); *id.* at 50 ("Justice O'Connor [] agrees that racial classifications carry dangers, but differs from the others on both the precise degree of racial motivation that causes harm and just what that harm is."); David M. Guinn & Paul C. Sewell, Miller v. Johnson: *Redistricting and the Elusive Search for a Safe Harbor*, 47 BAYLOR L. REV. 895, 904-06 (1995) (discussing Justice O'Connor's concurrence in *Miller* and predicting that her views in the then-pending *Shaw II* and *Bush* cases "may be dispositive").

> provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind. . . .
>
> . . . [A]pplication of the Court's standard helps achieve *Shaw*'s basic objective of making *extreme instances* of gerrymandering subject to meaningful judicial review.

115 S. Ct. at 2497 (O'Connor, J., concurring) (emphasis added) (first ellipsis in original) (internal citation omitted).

Justice O'Connor's perception of the threshold standard as a demanding test was not shared by Justice Ginsburg, who warned that the decision in *Miller* "open[ed] the way for federal litigation if 'traditional . . . districting principles' *arguably were accorded less weight* than race." 115 S. Ct. at 2507 (Ginsburg, J., dissenting) (emphasis added). The previous opinion of this court incorporated Justice Ginsburg's characterization of the *Miller* standard into its statement of the applicable threshold. *See Quilter*, 912 F. Supp. at 1026, 1027. The additional guidance of *Shaw II* and *Bush*, the clearer importance of Justice O'Connor's position, and her further elucidation of her views in a separate concurrence in *Bush*, *see infra*, however, make clear that the "predominant factor"/"subordination" test requires more than a showing that traditional districting principles "were accorded less weight than race."

3. *Shaw v. Hunt* (*Shaw II*)

Two cases decided on the same day, one year after *Hays* and *Miller*, further delineated the threshold analysis, particularly with regard to the role of traditional districting principles. The first was *Shaw II*, in which the five-member majority held that compliance with traditional districting principles does not necessarily shield a state from an

equal protection attack. In his dissent, Justice Stevens stated that the Court's previous opinions had established that "race-based districting which respects traditional districting principles does not give rise to constitutional suspicion," and that "States may avoid strict scrutiny by complying with traditional districting principles." 116 S. Ct. at 1913, 1914 (Stevens, J., dissenting). The majority, however, rejected Justice Stevens's view, emphasizing that the focus of the inquiry was whether race had been the predominant consideration, even if traditional principles were involved. 116 S. Ct. at 1901 & n.3. The Court held that although two race-neutral, traditional criteria had been at work in the drawing of the North Carolina district at issue, "[t]hat the legislature addressed these interests does not in any way refute the fact that race was the legislature's predominant consideration. *Race was the criterion that, in the State's view, could not be compromised . . .* [Traditional districting criteria] *came into play only after the race-based decision had been made.*" *Id.* at 1901 (emphasis added).

4. *Bush v. Vera*

Finally, the opinions of a fragmented Court in *Bush*, decided on the same day as *Shaw II*, shed light on the individual views of the various justices; as we noted above, Justice O'Connor's opinions for the plurality and for herself separately are especially valuable in guiding our application of the threshold analysis. Writing for a three-judge plurality,[6] Justice O'Connor stated:

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[6] Chief Justice Rehnquist and Justice Kennedy joined the plurality opinion, though Justice Kennedy wrote separately to disavow certain language in that opinion. *See* 116 S. Ct. at 1971 ("[T]he statements in Part II of the opinion that strict scrutiny would not apply to all cases of intentional creation of majority-minority districts . . . are unnecessary to our decision, for strict scrutiny applies here. I do not consider these dicta to commit me to any position on the question . . . .") (Kennedy, J., concurring). Justices Scalia and Thomas concurred in the judgment with a separate opinion authored by Justice Thomas. 116 S. Ct. at 1972.

> [The findings of the District Court] that the State *substantially neglected* traditional districting criteria such as compactness, that it was committed from the outset to creating majority-minority districts, and that it manipulated district lines to exploit unprecedentedly detailed racial data [] together weigh in favor of the application of strict scrutiny. We do not hold that any one of these factors is independently sufficient to require strict scrutiny. The Constitution does not mandate regularity of district shape, and *the neglect of traditional districting criteria is merely necessary, not sufficient. For strict scrutiny to apply, traditional districting criteria must be subordinated to race.* . . . [T]he direct evidence of racial considerations, coupled with the fact that the computer program used [in redistricting] was significantly *more* sophisticated with respect to race than with respect to other demographic data, provides substantial evidence that it was race that led to the neglect of traditional districting criteria here. We must therefore consider what role other factors played in order to determine whether race predominated.
>
> Several factors other than race were at work in the drawing of the districts. Traditional districing criteria were not *entirely* neglected . . . .
>
> Strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones. . . . Because it is clear that race was not the only factor that motivated the legislature to draw irregular district lines, we must *scrutinize each challenged district* to determine whether the District Court's conclusion that race predominated over legitimate districting considerations, including incumbency, can be sustained.

116 S. Ct. at 1953-54 (first, second and fifth emphases added) (internal citations omitted). In addition, the plurality opinion stated that "[i]f, as may commonly hap-

pen, traditional districting principles are substantially followed without much conscious thought, they cannot be said to have been 'subordinated to race.'" *Id.* at 1955.[7] The opinion noted, however, that the state appellants did not deny that a challenged district showed "substantial disregard" for the principles of compactness and regularity, or that "the redistricters pursued unwaveringly" the goal of creating a majority-minority district. *Id.* The Court upheld the district court's finding that traditional principles had been subordinated to race, so strict scrutiny applied.

In her separate concurring opinion, Justice O'Connor expressed her belief that *Shaw II* and *Bush* "present a

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[7] We do not believe that this statement conflicts with the Court's holding in *Shaw II* that compliance with traditional districting principles does not necessarily preclude strict scrutiny. The threshold inquiry examines the priorities of the state actors—i.e., if race was the first consideration (the one that "could not be compromised," *Shaw II*, 116 S. Ct. at 1901), and traditional principles "came into play only *after* the race-based decision had been made," 116 S. Ct. at 1901 (emphasis added), then strict scrutiny is triggered; if, on the other hand, traditional principles were followed first ("without much conscious thought"), and then racial considerations were fit into that framework, the threshold is not met. *See, e.g., DeWitt v. Wilson*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994) ("[I]n redistricting, consciousness of race does not give rise to a claim of racial gerrymandering when race is considered along with traditional redistricting principles . . . ."), *summarily aff'd mem.*, 115 S. Ct. 2637 (1995). *See also Abrams v. Johnson*, —— U.S. ——, 117 S. Ct. 1925, 1934 (1997) (upholding a district court's judgment drawing a plan with one majority-black district, rather than two, where the court had considered "that a black voting population was one factor in drawing a district," but had concluded that retaining a second majority-black district would require that one factor to predominate over traditional districting principles).

We emphasize that we use the word "first" in reference to prioritization, not to suggest a chronological process; we similarly interpret the Supreme Court's use of "after." A literal chronological reading would substitute an overly formalistic approach in place of the Court's "predominant factor" analysis.

workable framework" for reconciling the goals of the Voting Rights Act of 1965, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 *et seq.*) ("VRA"), and the Fourteenth Amendment. 116 S. Ct. at 1969 (O'Connor, J., concurring). She then once again rephrased the threshold for strict scrutiny:

> [S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. *Only if traditional districting criteria are neglected and that neglect is predominantly due to the misuse of race does strict scrutiny apply.*

Id. (some emphasis added) (internal citations omitted).

B. Policy Considerations

The development of the *Shaw* line of cases has raised the specter of tension between two distinct areas of voting rights law, potentially placing states in an impossible position; if strict scrutiny of districting plans were easily triggered, states might be threatened on one side by potential litigation under the VRA for failure to create majority-minority districts, and on the other side by potential litigation under the Equal Protection Clause for using race in drawing districts. *See, e.g., Bush*, 116 S. Ct. at 1968 (O'Connor, J., concurring) (referring to states' and lower courts' "toil[ing] with the twin demands of the Fourteenth Amendment and the Voting Rights Act"). *See also* Karlan, *supra*, at 289 ("States now find themselves walking a tightrope: if they draw majority-black districts they face lawsuits under the equal protection clause; if they do not, they face both objections under section 5 of the Voting Rights Act and lawsuits under section 2.") (footnotes omitted); Guinn & Sewell, *supra*, at 910 ("The dilemma essentially is whether a state must entertain for [§ 2] purposes a district which, if drawn, would force

strict scrutiny."); Laughlin McDonald, Essay, *Can Minority Voting Rights Survive* Miller v. Johnson*?*, 1 MICH. J. RACE & L. 119, 147-50 (1996). Nearly every plan would be challenged either because the districters considered race or because they did not, and nearly every plan would be subject to review by a federal court.

Although a districting plan might survive strict scrutiny, it could do so only if a federal court held that the state did indeed have a compelling interest to justify considering race and that the districting plan chosen by the state was narrowly tailored to serve that interest. *Bush*, 116 S. Ct. at 1960; *Shaw II*, 116 S. Ct. at 1902; *Miller*, 115 S. Ct. at 2490. A plan subjected to strict scrutiny would be saved from unconstitutionality only if the state was "right." [8] As a result, litigation would be virtually inevitable; any consideration of race in redistricting would be tested in the courts. Justice Ginsburg raised precisely this concern in *Miller*:

> The Court's disposition renders redistricting perilous work for state legislatures. Statutory mandates and political realities may require States to consider race when drawing district lines. But today's decision is a counterforce; it opens the way for federal litigation if 'traditional . . . districting principles' arguably were accorded less weight than race. . . .
>
> Only after litigation—under either the Voting Rights Act, the Court's new *Miller* standard, or both —will States now be assured that plans conscious of

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[8] For example, the defendants in the present case contended that they believed that avoidance of liabiilty under § 2 of the VRA required them to consider race in drawing the challenged districts; this court, however, held that the plan failed strict scrutiny because the defendants did not have a strong basis in evidence for that belief, since the evidence established that white bloc-voting (which is required to prove a § 2 claim) did not exist in Ohio. *See Quilter*, 912 F. Supp. at 1028-29. In other words, the court found that the defendants were not "right."

> race are safe. Federal judges in large numbers may be drawn into the fray. This enlargement of the judicial role is unwarranted.

115 S. Ct. at 2507 (internal citation omitted). *See also Abrams v. Johnson*, —— U.S. ——, 117 S. Ct. 1925, 1949-50 (1997) (Breyer, J., dissenting) (warning of legislators' difficulty in discerning what the predominant factor test means, and of "the risk of significant judicial entanglement in the inherently political redistricting process").

Justice O'Connor also has noted the tension. *See Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring):

> [T]he application of the principles that I have outlined sometimes requires difficult exercises of judgment. That difficulty is inevitable. The Voting Rights Act requires the States and the courts to take action to remedy the reality of racial inequality in our political system, sometimes necessitating race-based action, while the Fourteenth Amendment requires us to look with suspicion on the excessive use of racial considerations by the government.

But see id. at 1968 (stating her view that the results test of VRA § 2 "can co-exist in principle and in practice with *Shaw v. Reno*"). Recognizing the precarious position in which these "twin" constraints place states, *id.*, Justice O'Connor has accordingly sought to interpret the threshold as "demanding" and applicable only in "extreme" cases. *See Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring).

In addition to the "tightrope" that the VRA and *Shaw* force states to walk, it is worth noting that a state cannot be entirely certain of surviving strict scrutiny, even if it believes that its consideration of race is necessary to avoid § 2 liability and that its plan is narrowly tailored to avoid such liability. Although at least five members of the Court appear to have suggested that compliance with § 2 of the

VRA can be a compelling interest for purposes of strict scrutiny, the Court itself has not yet so held. *See, e.g., Miller*, 115 S. Ct. at 2490-91 (stating that "[w]hether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here [because the challenged plan was not required by the VRA]".); *Shaw II*, 116 S. Ct. at 1903 ("Here once again we do not reach that question [reserved in *Miller*]" because the challenged district was not required by VRA § 5 and was "not a remedy narrowly tailored to the State's professed interest in avoiding § 2 liability"); *Bush*, 116 S. Ct. at 1960 ("As we have done in each of our previous cases in which this argument has been raised as a defense to charges of racial gerrymandering, we assume without deciding that compliance with [§ 2] . . . can be a compelling state interest."); *Abrams*, 117 S. Ct. at 1936 (again assuming without deciding). *But see Bush*, 116 S. Ct. at 1968-70 (O'Connor, J., concurring) (stating that § 2 can satisfy the compelling interest prong of strict scrutiny); *id.* at 1989 (Stevens, J., dissenting, joined by Ginsburg, J., and Breyer, J. (see *id.* at 1974)) (appearing to agree); *id.* at 2007 (Souter, J., dissenting, joined by Ginsburg, J., and Breyer, J.) (same).

As we apply the threshold analysis developed by the Supreme Court in *Shaw* cases, we are mindful of the dangers that a low threshold (easily invoking strict scrutiny) poses for states. We therefore follow Justice O'Connor's lead in applying a demanding threshold that allows states some degree of latitude to consider race in drawing districts. While adherence to traditional districting principles does not automatically create a "safe harbor" from strict scrutiny, we will not apply strict scrutiny without the "necessary" showing by the plaintiffs that the defendants neglected traditional districting criteria and that that neglect is predominantly due to the misuse of race.

C. Traditional Districting Principles

As a preliminary step, it is necessary to define "traditional districting principles" as that concept is repeatedly emphasized in the *Shaw* line of cases. In general, traditional criteria include "compactness, contiguity, and respect for political subdivisions." *Shaw I*, 509 U.S. at 647; *see also Reynolds v. Sims*, 377 U.S. 533, 578 (1964) (holding that a "desire to maintain the integrity of various political subdivisions" and to "provide for compact districts of contiguous territory" are legitimate state interests in apportionment); *Karcher v. Daggett*, 462 U.S. 725, 56 n.18 (1983) (Stevens, J., concurring) (noting that, of 1981, one state statute and twenty-one state constitutions required compactness, and that two state statutes and twenty-seven constitutions required contiguity). The *Shaw* claim cases have repeatedly cited these criteria as traditional. *See, e.g., Miller*, 115 S. Ct. at 2488 (defining "traditional race-neutral districting principles" as "including but not limited to compactness, contiguity, [and] respect for political subdivisions or communities defined by actual shared interests"); *Bush*, 116 S. Ct. at 1953-54 (citing as evidence that "[t]raditional districting criteria were not *entirely* neglected" the maintenance of the integrity of county lines, the grouping of principal cities with their surrounding urban areas, the prevalence of incumbency protection, and the preservation of communities of interest (as determined by evidence other than racial data)).

The State of Ohio has established districting criteria to be followed, including the customary principles discussed above, in Article XI of the Ohio Constitution.[9] Many

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[9] The relevant provisions of Article XI are as follows (in the interest of brevity, we paraphrase where possible):

§ 2: The whole population of the state, as determined by the federal decennial census, shall be divided by ninety-nine to deter-

states have codified traditional districting criteria, either in statutes or in constitutions. *See Karcher*, cited above. Ohio, however, appears to have prescribed more extensive

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mine the ratio of house representation, and by thirty-three to determine the ratio of senate representation.

§ 3: The population of each house district shall be substantially equal to the ratio of house representation determined by § 2, and "in no event" shall any house district contain a population of less than ninety-five percent or more than 105 percent of that ratio, except "where reasonable effort is made to avoid dividing a county in accordance with section 9 . . . ."

§ 4: The population of each senate district shall be substantially equal to the ratio of senate representation determined by § 2, and "in no event" shall any senate district contain a population of less than ninety-five percent or more than 105 percent of that ratio.

§ 6: District boundaries shall not be changed until the next census, notwithstanding changes in boundaries of political subdivisions or city wards. District boundaries shall be created by using the boundaries of political subdivisions and city wards as they exist at the time of the census on which the apportionment is based, "or such other basis as the general assembly has directed."

§ 7: Captioned "Compact House districts composed of contiguous territory"

(A): Every house district "shall be compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line. To the extent consistent with the requirements of [§ 3] . . . the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties.

(B): "Where the requirements of [§ 3] . . . cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards."

(C): "Where the requirements of [§ 3] . . . cannot feasibly be attained by combining the areas of governmental units as prescribed in division (B) of this section, only one such unit may be divided between two districts, giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named."

(D): "In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted

and specific criteria than any other state. *See* Transcript of Trial Proceedings, Part 1 (November 16, 1994), R. 311, at 74-75 (testimony of Gordon Henderson, expert

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to the extent reasonably consistent with the requirements of [§ 3] . . . ."

§ 8: "A county having at least one house . . . ratio of representation shall have as many house . . . districts wholly within the boundaries of the county as it has whole ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining house . . . district.

"The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation for the house of representatives determined under [§ 2] . . . ."

§ 9: Where the population of a county is not less than ninety percent nor more than 110 percent of the house ratio, "reasonable effort shall be made to create a house . . . district consisting of the whole county."

§ 10: "The standards prescribed in sections 3, 7, 8, and 9 of this Article shall govern the establishment of house of representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:"

(A): "Each county containing population substantially equal to one [house] ratio . . . as provided in [§ 2], but in no event less than ninety-five per cent of the ratio nor more than [105] per cent of the ratio shall be designated a representative district."

(B): "Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and [110] per cent of the ratio may be designated a representative district."

(C): "Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house . . . districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county."

(D): "The remaining territory of the state shall be combined into representative districts."

§ 11: "Senate Districts shall be composed of three contiguous house of representatives districts. A county having at least one

witness for the plaintiffs, to the effect that the detail of Ohio's apportionment rules is unusual). Because Ohio has chosen to establish such detailed criteria and to constitutionalize them, the defendants argue that this court should abstain from reaching the issue of compliance with traditional districting principles, leaving it instead to the Ohio Supreme Court. The constitutionalization of districting criteria, however, does not preclude a federal court from applying the threshold analysis developed in the *Shaw* claim cases. If it did, Ohio, unlike other states, would be effectively immune from federal court review of its apportionment plans under *Shaw*, on grounds of abstention; moreover, any other state would be able to shield itself from *Shaw* challenges by similarly codifying or constitutionalizing its districting procedures. Such a result is untenable.

We reject the defendants' argument that we cannot address the question of their attention to or disregard of Article XI of the Ohio Constitution, at least to the extent that the state constitutional requirements coincide with the traditional criteria recognized by the United States Supreme Court.[10] The standard articulated by the Supreme

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whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

"The number of wholse ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation in the senate determined under section 2 of this Article."

[10] We recognize that the Supreme Court cases to date have not addressed the role of codified or constitutionalized districting principles where those principles do not coincide, and perhaps even conflict, with the general criteria identified by the Court. It is possible that the Court would choose to consider only the general

Court does not require us to find that the defendants violated a state constitutional provision, or alternatively that the defendants complied with a state constitutional

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criteria (as a federal conception of districting principles), to avoid becoming enmeshed in the specific requirements of the various states. In his dissent in *Shaw II*, Justice Stevens, disagreeing with the majority's conclusion that the noncompact appearance of District 12 in North Carolina suggested suspect race-based districting, noted that although the North Carolina Constitution required contiguity, it did not require compactness. 116 S. Ct. at 1915. Justice Stevens further wrote that "[g]iven that numerous States have written geographical compactness requirements into their state constitutions, North Carolina's omission on this score is noteworthy. . . . It reveals that North Carolina's creation of a geographically noncompact district does not itself mark a deviation from any prevailing state districting principle." *Id.* (citation omitted). "Indeed, the State's guide to redistricting specifically informed state legislators that compactness was of little legal significance." *Id.* at n.12. If Justice Stevens is correct that the state itself did not treat compactness as a traditional districting principle, and the Supreme Court judged a district in that state by its disregard of that "traditional" principle, then the Court may have chosen a generalized, as opposed to state-specific, approach to the threshold inquiry.

On the other hand, in a more recent decision the Court appeared to rely on state-specific criteria in upholding a district court's finding that traditional districting principles had not been subordinated to race. In *Lawyer v. Department of Justice*, —— U.S. ——, 117 S. Ct. 2186 (1997), the appellant challenged that finding, citing the challenged district's inclusion of more than one county, its crossing a body of water, its irregular shape, and its noncompactness. The Court rejected the appellant's arguments, pointing to "unrefuted evidence showing that on each of these points District 21 is no different from what Florida's traditional districting principles could be expected to produce." *Lawyer*, 117 S. Ct. at 2195.

A generalized approach would have the advantage of not subjecting a state that has clearly prescribed its criteria to a more exacting standard, and a more searching inquiry, than a state that has not done so. The obvious flaw in that approach, however, is that the threshold analysis is designed to identify situations in which states have neglected the criteria they would otherwise consider in pursuit of race-based objectives; if courts measure a state's plan by reference to general criteria, without regard for the state's own

provision; rather, the focus of the inquiry under Supreme Court precedent is whether defendants appear to have considered race within the context of applying traditional districting principles, or to have shoved traditional criteria aside in order to achieve a particular race-based result—in other words, whether the defendants substantially followed the prescribed principles or flagrantly ignored them.

The defendants contend that this court is precluded from holding that they neglected or violated the criteria of Article XI of the Ohio Constitution by the decision of the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992). The defendants argue that the entire plan, and all the arguments against it, were before that court; they point to Justice Resnick's detailed dissent, in which she discussed the plan as a whole and applied §§ 3, 4, 7, 9, and 10. 63 Ohio St. 3d at 214-230. They then rely on vague language from the last line of the per curiam opinion, which stated that "we find the plan to be constitutional." *Id.* at 200. The defendants contend that the Ohio Supreme Court considered the entire plan, and all the applicable provisions of Article XI, and declared the plan as a whole to be in compliance with the state constitution, precluding this court from finding otherwise.

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criteria (those that it would otherwise consider), the inquiry may fail to serve its very purpose. On the other hand, if the Supreme Court applied state-specific criteria, the principles relevant to the analysis could vary widely from state to state, resulting in different standards for different states; even more significantly, a state might be able to protect itself from *Shaw* scrutiny by establishing minimal or vague criteria (or perhaps none at all), such that it could *never* be found to have neglected or subordinated those criteria to race.

For our purposes, this apparently open question is not dispositive. Because the provisions of OHIO CONST., art. XI generally coincide with the traditional criteria of compactness, contiguity, and respect for political subdivisions, we need not decide what criteria are relevant where the state principles differ.

The fractured opinions in *Voinovich*, however, contradict the defendants' position. First, the per curiam opinion, which four of seven justices joined, was just over half a page in length. It discussed only Senate District 32, and applied only OHIO CONST., art. XI, §§ 4, 9, and 11, holding that those three provisions are coequal and that when they conflict, the apportionment board has the discretion to choose which to follow. 63 Ohio St. 3d at 200. Almost every justice wrote separately, shedding light on what each justice thought the per curiam opinion did and did not hold. Chief Justice Moyer, in a concurring opinion, stated that he believed that the only justiciable issues presented by the plaintiffs in that case[11] were "the dispute regarding Senate District 32 and House District 68 and the inconsistency between Sections 3, 4, 8 and 11 of Article XI . . . ." *Id.* at 201-202. Justice Holmes, "concurring separately," would have held that the plan as a whole did not violate Article XI "and specifically Sections 7 and 10 thereof," and that House District 68 and Senate District 32 were constitutionally drawn under Article XI and did not violate Sections 3, 4, 8, or 11. *Id.* at 202-05. Justice Douglas, concurring with the per curiam opinion, but "for different reasons than stated therein and with some reservations" (and with the agreement of Milligan, J.), narrowed the inquiry to Senate District 32 and to an apparent conflict between Sections 4 and 11. *Id.* at 205-14.

Justice Resnick, in a lengthy dissent joined by Justice Brown, analyzed the entire plan under all of Article XI and found numerous state constitutional violations. 63 Ohio St. 3d at 214-30. Hers appears to be the only opinion that fully addressed the plaintiffs' request that the plan as a whole be declared in conformity in all respects with Article XI; ironically, she concluded otherwise, and would have ordered that the plan be redrawn. Justice Sweeney also dissented, believing that the parties did not

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[11] The plaintiffs in the state court case are the defendants in this case, the Apportionment Board majority members.

have standinng, but stating that assuming *arguendo* that they did, he would concur in Justice Resnick's analysis. *Id.* at 214.

The only clear conclusion to be drawn from the state court's opinion is that it came to no clear conclusion as to the issues before this court. That opinion, therefore, neither precludes this court's consideration of the defendants' attention to traditional districting principles with regard to HD 31, HD 39, HD 44, and HD 49, nor mandates a particular finding by this court.

D. The Threshold Inquiry

The burden is on the plaintiffs to make a showing that the defendants substantially disregarded or neglected traditional districting principles and that they did so predominantly due to use of racial considerations in drawing the challenged districts. *See supra* Part III.A. As this court previously found, the plaintiffs presented direct evidence that clearly showed that the defendants used racial considerations in drawing the districts. *See Quilter,* 912 F. Supp. at 1023-25. James R. Tilling drew the plan that formed the basis for the reapportionment plan ultimately adopted by the Board.[12] Tilling's handwritten notes docu-

[12] Robert T. Bennett, the chairman of the Ohio Republican Party, did submit a plan to the Board on behalf of the party, and made a statement at a Board hearing that was substantially similar to a letter attached to that plan stating that the plan sometimes departed from the Ohio Constitution's requirements in favor of Voting Rights Act considerations. *See* R. 154, Ex. 15, at 27; Defs.' Trial Ex. 79. We note, however, that the Republican Party plan submitted by Bennett, and on which he based his remarks, was one of five proposed apportionment plans submitted to the Board, and was rejected by the Board. *See* R. 154, Ex. 15, at 7-8 (Governor Voinovich, at a Board hearing, stated that seven plans had been submitted and one withdrawn); *id.* at 26-30 (Bennett introduced the Republican Party plan); R. 147, Ex. A, ¶¶ 13, 14 (listing five submitted plans and their sponsors); R. 147, Ex. B, at 24 (referring to "[t]he Republican plan that was offered and rejected by this Board" and

menting the process by which he began drawing the reapportionment plan indicate that, for each county containing a significant minority population. Tilling displayed the minority population of the county on the computer screen, then proceeded to draw "minority districts," including HD 31, HD 39, HD 44, and HD 49, first.[13] R. 104, Ex. 120. The Apportionment Board Findings and Conclusions, adopted in February 1992, show that: the relative percentage of black population in what is now designated HD 31 was increased for the purpose of ensuring the election of a black candidate after the existing incumbent left office; the relative percentage of black population in what is now designated HD 39 was increased for the same reason; and the relative percentages of minority population in HD 44 and HD 49 were intentionally increased. R. 147, Ex. A, ¶¶ 182, 183, 191, 194,

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to "the plan that was actually adopted by the Board, referred to as the Tilling plan"). The Republican members of the Board submitted their own plan (which was not the Republican Party plan), drafted by Tilling, which the Board adopted. *See* R. 154, Ex. 15, at 89-118 (introduction of the majority members' plan); R. 147, Ex. B., at 24 (noting adoption of the Tilling plan); R. 147, Ex. A, ¶ 14 (same). Comments made by Bennett in reference to a rejected plan, therefore, appear to have no relevance to the motivations behind the plan adopted by the Board and now before this court.

[13] We note that none of the four districts at issue in this case is a majority-minority district; only one of the eight challenged districts, HD 30, is a majority-minority district, and we have held that the plaintiffs do not have standing to challenge that district. The other challenged districts are "influence districts," which are defined as "districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice." *Voinovich v. Quilter*, 507 U.S. 146, 149-50 (1993). *See also* Stanley Pierre-Louis, Comment, *The Politics of Influence: Recognizing Influenc Dilution Claims Under § 2 of the Voting Rights Act*, 62 U. CHI. L. REV. 1215 (1995); J. Morgan Kousser, *Beyond* Gingles; *Influenced Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551 (1993).

195.[14] We again find that race was a substantial factor in the drawing of the challenged districts. To invoke strict scrutiny of those districts, however, the plaintiffs must also show that the state substantially disregarded or neglected traditional districting principles—that race was the *predominant* factor, the criterion that could not be compromised. *See supra* Part III.A. We hold that the plaintiffs have failed to make this threshold showing.

The plaintiffs do not contend that the challenged districts are noncompact or noncontiguous, or that political subdivisions were not respected. Instead, they have pointed only to OHIO CONST., art. XI, § 7(D) as a principle that the defendants allegedly neglected, or subordinated to race, in the challenged districts. Section 7(D) requires that existing district boundaries (established by the previous apportionment) be maintained "to the extent reasonably consistent with the requirements of section 3 [dictating the permissible variance in population ratio] . . . ." As we stated above, we need not decide whether the defendants complied with or violated § 7(D); we need only decide whether the defendants pushed § 7(D) aside to meet their racial objectives. First, we note that we doubt that violation or neglect of this single criterion, one out of almost a dozen sections and subsections in Article XI that specifically establish guidelines for drawing districts, would be sufficient to show the kind of flagrant disregard that would indicate that traditional districting principles were subordinated to racial objectives, absent any allegation that other principles were neglected. Sec-

[14] We note that the Board adopted its Findings and Conclusions in response to this court's order, in the original litigation of the plaintiffs' vote dilution claim, to justify its creation of majority-minority districts. *Quilter v. Voinovich*, 794 F. Supp. 695, 701-02 (N.D. Ohio 1992). The Board's (perhaps disproportionate) focus on racial considerations in those findings, therefore, is hardly surprising; nevertheless, the Board detailed its use of racial considerations in drawing certain districts in its plan, and we treat those adopted findings as direct evidence of the use of race.

ond, § 7(D) does not appear to embody a traditional districting criterion previously recognized by the Supreme Court. The plaintiffs do not allege that the defendants did not seek to draw compact, contiguous districts that respected the integrity of political subdivisions (such as wards and precincts), the criteria typically mentioned by the Supreme Court as particularly relevant.

Even if the requirement of § 7(D) is a traditional principle, however, we find that it was not subordinated to race. Although Tilling apparently did not always follow § 7(D), as he believed that it conflicted with other Article XI provisions, including the prioritizing standards of § 10, forcing him to violate § 7(D),[15] the evidence does not indicate that the neglect of § 7(D) was related to Tilling's objective of increasing the percentage of minority population in the challenged districts. Without evidence showing some relation between the use of race and the disregard of customary districting principles—evidence that such principles were *subordinated* to race, rather than coincidentally neglected—the threshold for invoking strict scrutiny is not m Absent such evidence, we cannot conclude that traditional principles "came into play only after the race-based decision had been made," *see Shaw II*, 116 S. Ct. at 1901, rather than having been followed as a matter of course (i.e., "without much conscious thought," *see Bush*, 116 S. Ct. at 1955).

We believe this case is factually distinguishable from *Bush*, which was also a "mixed motive" case, in which

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[15] *See*, e.g., R. 350, Ex. A, at 8-10, 14, ¶¶ 10-16, 29-32 (Report of James R. Tilling); R. 123, at 145-46 (12/14/91 Tilling Dep.). We do not address whether Tilling's contention is correct. Although the defendants contend that the Ohio Supreme Court's decision in *Voinovich* affirmed the discretionary authority of the Apportionment Board to choose between conflicting coequal provisions, that court has not yet addressed the question whether § 7 is coequal with certain other provisions, particularly § 10. We need not decide this issue to reach our conclusion; in any event, we would abstain from considering this issue of state constitutional interpretation.

the defendants admittedly used race in drawing district lines but in which other goals also played a role. In *Bush*, the plaintiffs presented both objective and subjective evidence of racial motivation: a plurality of the Supreme Court agreed with the district court's finding that the challenged districts " 'ha[d] no integrity in terms of traditional, neutral redistricting criteria,' " and state officials conceded that they had deliberately sought to create majority-minority districts. 116 S. Ct. at 1952-53. That goal had been aided by a computer program that provided quite detailed data on racial composition, but not on other voter demographics. Some traditional principles had been followed: none of the districts was as widely dispersed as the North Carolina district invalidated in *Shaw II*, two of the districts maintained the integrity of county boundaries, all of the districts grouped a city with parts of its suburban area, and incumbency protection was a substantial factor statewide. *Id.* at 1953-54.

The *Bush* defendants did not deny that District 30 in Texas showed "substantial disregard" for compactness and regularity, and that the redistricters "pursued unwaveringly" the goal of drawing a majority-minority district. 116 S. Ct. at 1955. The plurality opinion stated:

> The record discloses intensive and pervasive use of race both as a proxy [for incumbency protection] . . . and for its own sake in maximizing the minority population of District 30 regardless of traditional districting principles. District 30's combination of a bizarre, noncompact shape and overwhelming evidence that that shape was essentially dictated by racial considerations . . . is exceptional . . . . That combination of characteristics leads us to conclude that District 30 is subject to strict scrutiny.

Id. at 1958.

As to Texas Districts 18 and 29, the *Bush* plurality noted that they were "two of the three least regular dis-

tricts in the country," and agreed with the district court that "[n]ot only are the shapes of the districts bizarre; they also exhibit utter disregard of city limits, local election precincts, and voter tabulation district lines." 116 S. Ct. at 1958, 1959 (citations omitted); *see also id.* at 1959-60 (quoting the district court's conclusion that "Districts 18 and 29 are formed in utter disregard for traditional redistricting criteria" and were unexplainable on nonracial grounds). Moreover, the district court had found that incumbency protection had been "overwhelmed . . . by the State's efforts to maximize racial divisions," and that "the intricacy of the lines drawn, separating Hispanic voters from African-American voters on a block-by-block basis, betrays the critical impact of the block-by-block racial data available" via the computer program. *Id.* at 1959.

The case before this court is considerably different. Most significantly, there is no evidence, aside from the admitted violation of § 7(D) (which, as we stated above, may not express a traditional principle), to suggest that the defendants disregarded traditional districting principles at all, let alone "utterly." In contrast to the Texas redistricters, the defendants here did not ignore customary criteria in pursuit of their racial objectives. There is no challenge regarding the contiguity or compactness of the districts. The challenged districts do not indicate disregard for political subdivisions, such as the block-by-block gerrymandering of Texas Districts 29 and 30. Also, we note that the fact that Tilling was aided by a computer program that provided data on racial composition is not in itself sufficient to demonstrate that race overwhelmed other criteria; *Bush* relied on a "combination of characteristics" to hold that strict scrutiny applied. We do not find a combination of characteristics sufficient to invoke strict scrutiny in this case.[16]

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[16] Because we hold that strict scrutiny is not triggered, we do not address the issue of whether the defendants had a compelling

IV. RATIONAL BASIS SCRUTINY

Having found that strict scrutiny is not applicable to the challenged districts, we now must determine whether a less demanding standard applies, and if so, whether the districts meet that standard.

Generally, a claim under the Equal Protection Clause is evaluated under a rational basis standard of review. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Racial classifications are almost always subject to strict scrutiny. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989). *Shaw I* held, in essence, that in certain "exceptional" cases, an electoral district could be seen as a racial classification; though a district is a facially neutral classification, plaintiffs could invoke strict scrutiny by showing (through disregard of traditional districting principles) that it "could not rationally be understood as anything other than" a racial classification. *See Shaw I*, 509 U.S. at 642-44, 646-47, 649. If, however, plaintiffs cannot show that race was the "predominant factor" to which traditional districting principles were "subordinated," and thus cannot meet the threshold for triggering strict scrutiny, *see Miller*, 115 S. Ct. at 2488, it follows that the facially neutral classification (the electoral district) will be subject, at most, to rational basis review.

Arguably, no level of scrutiny is applicable once the plaintiffs fail to meet the threshold established by the *Shaw* cases. *Shaw I* was the first case to recognize the "analytically distinct" claim under equal protection that an electoral district could constitute an unjustified racial classification. Absent a sufficient showing that race was the predominant factor in the creation of the district, perhaps the claim not only fails to invoke strict scrutiny, but also fails to constitute a

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interest to justify race-based redistricting, or whether the Board's plan was sufficiently narrowly tailored.

valid equal protection claim as recognized by *Shaw I*. *See, e.g., DeWitt v. Wilson*, 856 F. Supp. 1409, 1415 (E.D. Cal. 1994) (Where the court found that a redistricting plan was not racial gerrymandering, because race had been considered along with traditional districting principles, the court held that strict scrutiny was not required and that the plaintiffs had failed to state a claim under *Shaw I*.), *summarily aff'd mem.*, 115 S. Ct. 2637 (1995). Under that interpretation of Supreme Court precedent, we would find no valid claim under *Shaw I* and would enter judgment for the defendants.

In many situations, however, the Supreme Court has applied rational basis scrutiny after it has decided that strict scrutiny is inapplicable. *See, e.g., Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58 (1988); *Martinez v. Bynum*, 461 U.S. 321, 328 n.7 (1983). Therefore, we will subject the challenged districts to rational basis scrutiny. This low level of scrutiny requires that a classification "must be rationally related to a legitimate governmental purpose." *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *see also Cleburne*, 473 U.S. at 440 ("rationally related to a legitimate state interest"). We apply this standard with particular deference, given federal courts' reluctance to interfere with state apportionment activities:

> Federal court review of districting legislation represents a serious intrusion on the most vital of local functions. . . . Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests. . . . The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus.

Miller, 115 S. Ct. at 2488; *see also id.* at 2483 ("[A]pplication of [equal protection] principles to electoral dis-

tricting is a most delicate task."). We thus hold that an especially deferential standard of scrutiny applies.

The Supreme Court has explicitly recognized that redistricting is unique in that legislatures are always aware of race, and that a finding of racial discrimination requires more than mere race consciousness. *See, e.g., Shaw I*, 509 U.S. at 646 ("[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of . . . other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination."). In fact, given the demands of the Voting Rights Act, which requires some degree of race consciousness on the part of states engaged in residistricting, consideration of race, in conjunction with (and not in predomination over) other demographic data and traditional districting criteria, clearly is a legitimate state interest.[17] Consideration of other data and application of customary districting principles are also legitimate state interests in the apportionment process—even more so here, where the state has prescribed detailed criteria and practices in the state constitution.

We have no reason to conclude that the districts at issue are not reasonably related to these legitimate interests. As we have discussed above, the plaintiffs have not alleged that the defendants did not follow traditional districting principles, with the lone exception of Article XI, § 7(D) of the Ohio Constitution. Absent any evidence of

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[17] In the previous opinion of this court, we held that the challenged districts failed strict scrutiny because the defendants did not have a "strong basis in evidence" for believing that they risked liability under § 2. *See Quilter*, 912 F. Supp. at 1027-30. That standard, however, is applicable only to the more demanding "compelling interest" test relevant to strict scrutiny. Here, the more deferential rational basis test requires only that we find a legitimate state interest. *See Clark*, 486 U.S. at 461; *Cleburne*, 473 U.S. at 440.

irrationality, we find that the districts survive deferential scrutiny.

V. CONCLUSION

Although we find that race was a substantial factor in the drawing of the challenged districts, we find that it was not a "dominant and controlling rationale" to which traditional districting principles were subordinated; rather, race was a factor that was considered within the constraints of those traditional districting principles. We thus hold that strict scrutiny of the challenged districts is not appropriate under governing Supreme Court precedent. Applying rational basis scrutiny, we hold that the Apportionment Board had a rational basis for creating the challenged districts. We therefore enter judgment for the defendants.

IT IS SO ORDERED.

/s/ Karen Nelson Moore
KAREN NELSON MOORE
U.S. Circuit Judge

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
Senior U.S. District Judge

NATHANIEL R. JONES, dissenting. At the outset, let me be abundantly clear as to what the plan at issue in this case is *not*. It is *not* an attempt to effectively remedy decades of racially polarized voting in the particular legislative districts involved, as is the case in various preclearance jurisdictions. To the contrary, the reapportionment plan here *is* a scheme to *contain*, and will most assuredly limit, the voting power of black electors. The plan, which purports to strengthen black political potential, in a real sense, actually weakens it. The fatcs of record clearly demonstrate that state apportioning officials engaged in a ruse to limit black voter impact that used as a shield the Voting Rights Act and the Constitution. Because I cannot in good conscience endorse the misuse of these laws that were enacted to remedy the historic denial of voting rights to black Americans, I respectfully dissent.[1] Manipulating the Voting Rights Act, as was done here to accomplish a purpose contrary to the true extension of black voting rights, although skillful and sophisticated, cannot be allowed to overwhelm the long line of precedents aimed at removing the barriers to minority voting and designed to remedy the effects of those barriers. *See Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) (holding that courts must strike down the "sophitictaed" as well as "simple-minded" schemes that offend the Constitution); Lane v. Wilson, 307 U.S. 268 (1939).

The way in which the Apportionment Board used black voters in drawing the legislative districts at issue, without first showing polarized or bloc voting, was nothing short of doing a dance on the graves of Medger Evers, Harry T. Moore, Michael Schwerner, Andrew Goodman, James Chaney, and the hosts of others who died in an effort to bring about the enactment of the Voting Rights Act. I write in dissent to further express my profound disagreement with this court's effort, even in good faith, to make

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[1] I agree with the majority's standing analysis. Consequently, only house districts 31, 39, 44, and 49 are at issue in this case.

constitutional sense out of the Ohio reapportionment officials' paternalistic exploitation of a civil rights remedial statute in order to achieve a dubious political objective. I am astonished at the way the state reapportionment officials dared to act under color of the Voting Rights Act in districts where the very objectives of that Act are already being fulfilled by rational voter conduct. Therefore, I feel obligated to set out with some specificity the reasons I part company with my distinguished colleagues.

I. Background

Pursuant to the Ohio Constitution, the State Apportionment Board, comprised of five members, must reapportion State House and Senate electoral districts for the state legislature every ten years.[2] Following the 1990 federal census, a majority of the Apportionment Board[3] ap-

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[2] Article XI, Section 1 of the Constitution of the State of Ohio provides:

> The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.
>
> Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year [1971] and every tenth year thereafter....

Ohio Const., art. XI, § 1.

[3] The majority consisted of Defendants George V. Voinovich, Governor of the State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and Robert A. Taft, II, Secretary of the State of Ohio. In the minority were Plaintiffs Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, and Thomas E. Ferguson, Auditor of the State of Ohio.

pointed James R. Tilling to draft an apportionment plan on behalf of the Board. After conducting public hearings throughout the state, including meeting with some members of minority organizations, Tilling drafted a plan that included eight majority-minority districts, districts in which a majority of the population is a member of a specific minority group. *Voinovich v. Quilter*, 507 U.S. 146, 149 (1993).

Robert T. Bennett, the Chairman of the Ohio Republican Party, then submitted the apportionment plan to the Board. He also attached a letter to the plan, which stated in pertinent part:

> [W]e have made every possible effort to achieve maximum possible compliance with federal and state law and constitutions, especially the Voting Rights Act. It was not always possible to reconcile these laws however, and sometimes we were forced to make a choice. There were several occasions when we had to make elections between blind adherence to the Ohio Constitution's dictate regarding population density and preservation of artificial boundary lines on the one hand, and the clear duty to reach out for all reasonably cohesive groups of minority voters. On each occasion, we opted to comply with the Voting Rights Act.
>
> We have therefore sometimes departed from the Ohio constitution's rigid geographical requirements and mandatory population deviations. . . .[4]

On October 1, 1991, the Apportionment Board adopted the plan Tilling submitted by a 3-2 vote. *Id.* The Board

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[4] This Court's previous findings of fact—still controlling in this case—indicate that the Tilling plan encompassed the same objectives as the Bennett plan:

> This court was not faced with mere race-conscious redistricting that sought to avoid the division of contiguous, cohesive concentrations of minorities. This Court was also not faced

later reconvened on October 3, 1991, to make several technical amendments to the plan, and the plan, adopted

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> with a plan that simply created a substantial number of majority districts without explanation. Finally, this Court was not faced with a state subject to § 5 of the Voting Rights Act, in which case the historical violation of minority has been conclusively established. Rather, this Court addressed an Apportionment Board that *applied a rule mandating the creation of majority-minority districts wherever possible.* The Board did not purport to devise this rule based on Ohio policy and law; rather, it contended that such a per se rule is mandated by federal law.

Quilter v. Voinovich, 1992 WL 677145, *2 (N.D. Ohio March 19, 1992) (emphasis added). The earlier finding of this Court squares with the spirit and letter of Robert Bennett, whose plan we previously found to have heavily inflenced the ultimate Tilling plan. "Tilling states that, in the most populous counties, he drew boundaries in accordance with his understanding of the requirements of the Voting Rights Act first. Deposition of Tilling, 11/21/91, at 49, 199-206. There were times when he would cross Ohio political boundaries in order to comply with his understanding of the Voting Rights Act. If there had been no Voting Rights Act requirement to create majority-minority districts, he understood that he would not have had to cross Ohio poiltical boundaries. . . . Tilling had the 'Republican Opportunities' document prior to his submission of the plan and while he was drawing the plan. Deposition of Tilling, 11/22/91, at 17-19." *Quilter*, 1992 WL 677145, *10 n. 8-9. Thus, the Bennett letter says in an outward manner what we found to be the state of affairs based on testimony of the major players, including James Tilling. There were also other influential players and documents. The "Republican Opportunities" documents referred to above discussed 19 ways in which the Republican Party could advantage itself in the redistricting process. The document lists several counties as "opportunities" to "pack as many Demos as possible into 2 Black-majority inner-city [House Districts]." Deposition of Horn, 12/10/91, Ex. 1. The document concludes with a final shot: "Make good on 12 of these opportunities and you know the consequences." *Id.* There were other documents and testimony relied upon by this court to make its factual determination that a racial containment strategy had been followed. Tilling himself—after initially characterizing deposition questioning as a "gross misrepresentation of his actions"—was forced to concede that he had changed districts in every instance in which blacks

on October 3, 1991, in the wake of these changes, was designated "Amendment C."

On November 1, 1991, Barney Quilter and Thomas Ferguson, the two Board members who voted against the plan, and various other officials and legislators filed suit against the other members of the Apportionment Board and Tilling. Seeking invalidation of the plan, the Plaintiffs alleged that the redistricting plan violated section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution, which provided specific apportionment guidelines. *Voinovich v. Quilter*, 794 F. Supp. 695, 695-96 (N.D. Ohio 1992). According to the Plaintiffs, the Defendants intentionally "packed minorities into certain districts where minorities historically were able to elect representatives of choice with crossover votes." *Id.* at 698. The Plaintiffs contended that this packing resulted in a waste of minority votes in the packed districts and a dilution of minority voting strength in the surrounding areas where the "packed" voters could influence elections. *Id.* In response, the Defendants contended that the plan actually enhanced the strength of black voters by creating safe, minority-dominated districts. As justification for these changes, the Defendants cited compliance with the Voting Rights Act and federal case law, which allegedly mandated the drawing of majority-minority districts. *Id.*

On January 31, 1992, a majority of this three judge panel held that there was "no legal mandate or finding of a Voting Rights Act violation to justify Defendants' creation of majority-minority districts wherever possible in the 1991 Apportionment Plan." *Id.* at 701. Thus, the panel

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had been elected with white cross over support. Deposition of Tilling, 11/20/91, at 198-202; *See also* Plaintiff's Proposed Findings of Fact, 12/17/91, ¶¶ 445-545; Deposition of David Horn, 12/10/91, at 44-58. At bottom, we found that, based upon this and other evidence, the engine of race motivated the containment districting strategy used here. Given the record of the case, my position is that strict scrutiny must apply.

ordered the Board to draft a new plan or demonstrate that it was remedying a section 2 violation.[5] *Id.* at 702.

The Apportionment Board responded by establishing and adopting a record on February 18, 1992, that, in its view, justified the Board's creation of minority-controlled state legislative districts. Furthermore at its February 18 meeting, the Board amended the 1991 plan to eliminate a series of technical errors in the plan that the Ohio Supreme Court had identified in its separate review of the plan, *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992) (per curiam). The resulting 1992 plan, "Amendment D," created only five majority-minority districts, which constituted a reduction from the eight majority-minority districts in the 1991 plan, "Amendment C."

On March 10, 1992, after the Board submitted its findings and conclusions, along with the new 1992 plan, this court held that the Board "fail[ed] once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965." *Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992) (order). Furthermore, this court held that the 1992 plan also violated the Fifteenth Amendment of the United States Constitution. *Id.* Nine days later, in response to Defendants' motion for a stay of the March 10 order pending appeal to the United States Supreme Court, this court additionally held that both the 1991 and 1992 plans violated the Fourteenth Amendment because they departed from the requirement that all districts be of nearly equal population. *Quilter v. Voinovich*, No. 5:91CV-2219, 1992 WL 677145, at *10 (N.D. Ohio Mar. 19, 1992).

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[5] We declined to address the Plaintiffs' constitutional claims at this point because our analysis under the Voting Rights Act required the plan to be justified or revised. Likewise, because the Ohio Supreme Court, in *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992) (per curiam), was concurrently considering the Plaintiffs' claim under the Ohio Constitution, we abstained from addressing the pendent claim.

The Defendants appealed to the United States Supreme Court. In *Voinovich v. Quilter,* 507 U.S. 146 (1993), the Supreme Court reversed this court's *Quilter* decisions. Denying two of the Plaintiffs' claims, the Court held that the reapportionment plan at issue did not violate section 2 of the Voting Rights Act, nor did it violate the Fifteenth Amendment to the United States Constitution. *Id.* Nevertheless, the Court held that the Plaintiffs had established a *prima facie* case that the population deviations between the districts violated the Equal Protection Clause, and the Court remanded "only for further proceedings on whether the plan's deviation from equal population among districts violate[d] the Fourteenth Amndment." *Id.* at 152.

Upon remand, this court held that the Ohio reapportionment plan survived scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause because (1) the Defendants advanced a genuine, rational state policy to justify the deviations from population equality among the state legislative districts; (2) their plan reasonably furthered the rational state policy; and (3) the 13.81% and 10.54% total deviations fell within constitutional limits. *Quilter v. Voinovich,* 857 F. Supp. 579, 587 (N.D. Ohio 1994). Accordingly, judgment was entered for the Defendants on this issue.

While the latter decision was pending, however, the Plaintiffs moved this court for permission to amend their complaint in light of the Supreme Court's recent decision in *Shaw v. Reno,* 509 U.S. 630 (1993). As a lower court, this court is bound to follow the Supreme Court's decision in *Reno,* where the Court held for the first time that a plaintiff could state a claim under the Equal Protection Clause by alleging that a districting plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 2828. Thus, this court granted the

Plaintiffs' motion, and their complaint was accordingly amended.[6] *Quilter v. Voinovich*, 157 F.R.D. 36, 40 (N.D. Ohio 1994).

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[6] The Plaintiffs' Second Amended Complaint revised the First Amended Complaint in only two respects. First, Count IV, entitled "Violation of the Equal Protection Clause—Segregation of Voters by Race Without Compelling Governmental Justification," is added. Second, the prayer for relief was accordingly revised. In pertinent part, Count IV alleges the following:

> 52. . . . The reapportionment plan adopted by the Defendants on February 18, 1992 intentionally separated Ohio voters on the basis of race without regard for the traditional redistricting principles set forth in the Ohio Constitution and otherwise without any compelling governmental justification. To justify the creation of race-based districts in the urban centers of Ohio, Defendants asserted that there was widespread racial bloc voting throughout Ohio. The trial court specifically found, and the Supreme Court of the United States confirmed, that Ohio did not suffer from legally cognizable racially polarized voting. . . .
>
> 53. The Defendants deliberately, created race-based legislative districts in urban centers initially and then used the purported, but sham, necessity of creating such districts as the basis for ignoring the traditional anti-gerrymandering provisions of the Ohio Constitution throughout the state of Ohio. Absent the ripple effect of the racial gerrymandering in the urban centers of the state of Ohio, the Defendants would not have been forced to ignore on a wholesale basis the directives of Article XI, Section 7, of the Ohio Constitution to follow existing political and legislative boundaries wherever possible.
>
> 54. . . . The decision to abandon the traditional districting mandates contained within the Ohio Constitution is neither compelled by the doctrine of federal supremacy, nor based on any lawful, organized, or rational districting criteria. . . .
>
> 55. The Defendants have articulated no compelling governmental interest for the wholesale abandonment of the provisions of the Ohio Constitution. As a result, the Defendants have drawn irregular districts in numerous places throughout the state, districts which have no explanation other than the ripple effects caused by the racially drawn districts in the urban centers. In some instances, the racially drawn districts

On August 11, 1995, this court found that the 1992 redistricting plan violated the Equal Protection Clause. *Quilter v. Voinovich,* 912 F. Supp. 1006 (N.D. Ohio 1995) (per curiam). Specifically, the panel found that when the legislature subordinates traditional race-neutral districting principles to racial considerations strict scrutiny applies. *Id.* at 1019. Thus, if the Plaintiffs offer proof "substantiating that race was the predominant factor motivating the state's apportionment process, then this gives rise to a presumption that the plan is unconstitutional, and the burden shifts to the Defendants to demonstrate that their use of race in redistricting was narrowly tailored to meet a compelling state interest. . . ." *Id.* (citations omitted).

Having said this, the court then focused on the eight Ohio districts that were allegedly racially gerrymandered. The Defendants admitted that they considered race when redistricting, but argued that such considerations were mandatory under section 2 of the Voting Rights Act. *Id.* at 1023. After reviewing all of the evidence, the panel found that "race was the predominant motivating factor in the Defendants' creation of House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan because traditional districting principles were subordinated to or given less weight in the reapportionment process than racial considerations." *Id.* at 1027. Thus, the court subjected the 1992 plan to strict scrutiny.

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themselves have irregular shapes not required by the Ohio Constitution.

56. The districts which have been modified solely on the basis of race include House Districts 31, 30, 22, 21, 38, 39, 44, and 49. No evidence has been presented to the trial court that either legally cognizable remedial action was necessary to draw these racially gerrymandered districts, or that the creation of such districts was narrowly tailored to further any compelling governmental need.

Pls.' Second Am. Compl. ¶¶ 52-56.

All of the foregoing were defended on the basis that the State had a compelling interest. The Defendants argue that they met strict scrutiny because a compelling interest existed—compliance with section 2 of the Voting Rights Act. *Id.* Were that really the case, I would enthusiastically join the majority. However, even under the revised jurisprudence post-*Shaw*, the record does not support that argument. In order to show that section 2 is a compelling state interest the Defendants must have an adequate basis in evidence that race-based redistricting was necessary as a remedial measure to comply with the Voting Rights Act. *Id.* at 1028. This they have not done. To establish this, the Defendants had to show that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* (quoting *Voinovich v. Quilter*, 113 S. Ct. at 1157 (other citations omitted)). The court found as a matter of fact that such race-based voting did not exist in Ohio with respect to the districs at issue. *Id.* In fact, the court found significant cross over voting by white voters. For example, the percentage of white cross over votes in each of the challenged districts was as follows: Rep. Mallory—50.66%; Rep. Roberts—45.98%; Rep. Sykes—48.76%; and Rep. Jones—44.46%. *Id.* (citation omitted). Moreover, the 1992 plan expert, Dr. King, analyzed over 200 elections throughout Ohio and found that in 1984 56.7% of whites voted for black candidates. *Id.* at 1029. Even the election board recognized the existence of white cross over voting in the black districts where race-based remedial measures were utilized. *Id.* at 1029 (citing Board Findings ¶ 168). In light of the record, the explanations were suspect. Thus, this court found that no compelling interest existed for the race-based redistricting, and a majority of the panel struck down the plan. *Id.* at 1029-1030. The Supreme Court then vacated this decision and asked us to consider it in light of its two

new decisions *Bush v. Vera*, 116 S. Ct. 1941 (1996), and *Shaw v. Hunt*, 116 S. Ct. 1894 (1996).[7]

II. The Convergence of Race and Precedent

I take pains to write at this length and to place the issue of voting rights and race in a broader framework, because of the confusion that is obvious over the appropriate use of race in civil rights remedial contexts generally and in voting rights cases in particular. *See Shaw v. Reno*, 509 U.S. 656 (1993). The confusion is based on the extent to which such remedies must be race sensitive. This confusion may grow from a mistaken notion that Justice John Marshall Harlan's dissenting opinion in *Plessy v. Ferguson*, 163 U.S. 537, 552-564 (1896), with respect to the Constitution being color-blind, carried the day in 1896. However, Justice Harlan stood alone as the Supreme Court majority rejected his view. Justice Henry Billings Brown, writing for seven of his colleagues, asserted that the Fourteenth Amendment Equal Protection Clause did not bar the segregation of black citizens so long as the separate treatment of them equaled that accorded to white citizens. *Plessy*, 163 U.S. at 548-549. In dismissing the arguments of blacks against the validity of that proposition, Justice Brown declared that there was no stigma associated with segregation and to the extent that blacks felt demeaned and stigmatized, it was only because "the colored race [chose] to put that construction upon it." *Id.*, at 551.

Conceding that the ground has shifted somewhat in civil rights jurisprudence, this court can conclude, with no need for specific authority, that the harmful impact of *Plessy*

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[7] Since the remand, the Supreme Court has also addressed this issue in *Abrams v. Johnson*, 1997 WL 331802, at *8 (U.S. June 19, 1997) (Westlaw pagination). A careful consideration of the multiple opinions in those cases do not provide any compelling interest validation of a "containment" plan such as this which threatens to impact so adversely on black political participation.

misshaped America's institutions. It was 58 years later, in *Brown v. Board of Education*, 347 U.S. 483 (1954), that the Supreme Court got around to overturning that decision. Since *Brown*, through a series of decisions and statutory enactments, including the Voting Rights Act of 1965, efforts have been made, through the benign use of race, to root out the invidious vestiges of *Plessy v. Ferguson*. Nowhere have these vestiges been more deeply entrenched than in the area of voting rights. At the core of these remedial efforts was a principle that race had to be considered in any efforts to eliminate the effects of the generations of invidiously using race. "In order to get beyond racism, we must first take account of race." Univ. of California Regents v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring). What has led to the grossly mistaken turn in our jurisprudence, and the post-*Shaw* confusion, is the belief that the evils wrought by *Plessy* have been totally eradicated, and that any further remedies designed to address them must be color-blind. The record of coalitional cross over voting in the districts at issue is an encouraging measure of the extent to which the remedial laws have been effective. Nevertheless, in face of this small forward step, I cannot join in a solution that halts, and may even reverse, the gains made. The record in this case, without question, is at sharp variance with the racial obstinacy in the various pre-clearance jurisdictions and requires a different analysis.

III. Analysis

It is the aforementioned that derails the train from the compelling purpose track. The majority erroneously concludes that strict scrutiny does not apply to the reapportionment plan in this case. The majority holds that in order for strict scrutiny to be triggered race must be the "substantial factor in the drawing of the challenged districts . . . to which traditional districting principles were subordinated. . . ." Maj. Op. at 37. "[W]e will not appy

strict scrutiny without the 'necessary' showing by the plaintiffs that the defendants neglected traditional districting criteria and that neglect is predominantly due to the misuse of race." *Id.* at 21. It is of course, unfortunate, in my view, to be required in cases seeking to remedy ages-old discrimination, to prove the obvious about race. Under our prior jurisprudence, this plan would not even meet the intermediate scrutiny test due to its limiting effect on minority voting. Conceding what is required to be shown, I, nevertheless, do not believe that the majority's position accurately states the law with respect to a plan that negatively impacts minority political potential. The recent cases require that even under the majority's test, strict scrutiny applies to the state's reapportionment containment plan.

A. The Test

In *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*), the Supreme Court first ruled actionable an equal protection claim that challenged districts which were drawn based on the race of the voters. Since then the Court has attempted to further define when states violate the Equal Protection Clause in redrawing their districts.

Of course, redistricting legislatures are always conscious of racial demographics; "but it does not follow that race predominates in the redistricting process." *Miller*, 115 S. Ct. at 2488. Because it is difficult to distinguish between a legislature merely taking account of race and a legislature that is motivated by race, courts must exercise "extraordinary caution" in adjudicating such claims. *Id.*; *see also Shaw v. Hunt*, 116 S. Ct. 1894, 1900 (1996) (*Shaw II*). If race, however, is the predominant factor motivating a legislature to place a significant number of voters within or without a particular district, then this court must apply strict scrutiny to the redistricting plan. *Abrams v. Johnson*, Nos. 95-1425 and 95-1460, 1997 WL 331802, at *8

(June 19, 1997) (Westlaw pagination) ("If race is the predominant **motive** in creating districts, strict scrutiny applies. . . .") (emphasis added); *Shaw II*, 116 S. Ct. at 1900 (holding that the constitutional wrong occurs when race becomes the "dominant and controlling" consideration); *Miller*, 115 S. Ct. at 2487-88.

Consequently, the court does not need to look at whether race trumped other districting principles, but instead must determine whether race was the main factor the legislature considered when drawing its district lines. I do not dispute that the districts are compact and contiguous in this case, but that should not allow a legislature to shield its plan from review, especially where irrespective of the shape of the districts race remained the primary motivation. *Compare Miller*, 115 S. Ct. at 2488 (holding that in order for strict scrutiny to apply race must be the "predominant factor motivating the legislature's [redistricting] decision") *with Bush*, 116 S. Ct. at 1973-74 (Thomas, J., concurring) (stating that strict scrutiny should apply when race is a motivation for the drawing of districts). Indeed, the line of recent Supreme Court cases do not seem to abandon altogether benign considerations of race in the redistricting process. *See Shaw II*, 116 S. Ct. at 1902 ("A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions"); *Bush*, 116 S. Ct. at 1969 ("so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may otherwise take race into consideration, without coming under strict scrutiny") (O'Connor, J., concurring); *Bush*, 116 S. Ct. at 1971 ("The State may not engage in districting based on race except as reasonably necessary to cure the anticipated § 2 violation, nor may it use race as a proxy to serve other interests") (Kennedy, J., concurring). These cases attempt to define when racial considerations as such are appropriate. In my view, the discrimniatory intent manifest

in the development of this plan moved beyond benign considerations of race into invidious uses for containment purposes. To hold, as the majority does, that "subordination" can only be proven if a state abandons or violates traditional districting principles in favor of racial considerations constitutes a logical fallacy. Such a conclusion is fallacious because it is certainly possible, both logically and factually, that districts could be crafted within the confines of traditional districting principles and still be predominantly motivated by discriminatory racial considerations. *See Abrams*, 1997 WL 331802, at *8 (stating that if race is the predominant motive strict scrutiny applies). Furthermore, to conclude otherwise accords a preclusive constitutional significance to a state's compliance with traditional districting principles, which exceeds the significance accorded by the Supreme Court. *See Shaw II*, 116 S. Ct. at 1900; *Miller*, 115 S. Ct. at 2489-91.

Taken together, the sum of the Supreme Court's decisions leads me to conclude that a plaintiff may satisfy the predominant factor test and prove that traditional districting principles were a subordinate motivation not only when a state violates or abandons traditional districting principles in favor of racial motivations, but also when a state substantially complies with traditional districting principles and there is nevertheless a strong discriminatory motivation.

B. Application

In the case at bar, the record is replete with evidence that race was the predominant motivation of the state officials when they drew the districts at issue. In fact, there is substantial evidence in the record indicating that back room decisions such as those outlawed in *Gomillion v. Lightfoot* have made a mockery of the substantial racial progress with respect to voting patterns in the districts at issue.

When the plan was submitted as a whole to the Board, the letter attached stated, "There are several occasions when we had to make election between blind adherence to the Ohio Constitution's dictate regarding population density and preservation of artificial boundary lines on the one hand, and the clear duty to reach out for all reasonably cohesive groups of minority voters. On each occasion, we opted to comply with the Voting Rights Act." Robert T. Bennett Letter (September 26, 1991). This letter declares in clear terms that when the districting board had to choose between race and traditional districting principles, they chose race. Were minorities shown to lack meaningful cross over support, such action by the Board would have been laudable. In the face of cross over voter evidence on the record, it stands to reason that the districting board made the wrong choice. *Abrams*, 1997 WL 331802 at *12.

James Tilling's (the state expert who drew up the plan) actions in developing the plan are direct evidence of the apportionment board predominantly using race. The record clearly establishes that Tilling first set out to draw minority districts. He testified, without equivocation, that his first goal was to gather data on his computer on black populations and black voting age population by district, ward, or precinct. He then drew the black districts first by aggregating black populations on his computer and drawing lines around those populations. *Deposition of James Tilling*, Docket #102, at *84-91, *97-106 (11/20/91). He further admitted that the black population was needlessly added to districts already represented by black legislators. This was to "ensure that black persons would be elected in the future."

All of these tactics are further buttressed by Tilling's hand-written notes. Finally, throughout his report Tilling relies upon the untenable and prejudicial presumption that all blacks have similar income, education, housing values,

health, and criminal justice concerns. *Tilling's Report* at ¶ 70. Tilling *never* advanced a claim, statistical evidence or a mere guess that discriminatory voting patterns necessitated his actions. Evidence of black candidates being rejected by white voters in the legislative districts under review would have provided justification, indeed, would have compelled the affirmative use of race.

The Board's justification for the districts in question highlight that race was not only the primary motivation, but the only motivation in drawing these districts. Again, I emphasize that race was used here in a way to contain, not enhance, black political empowerment. Racial voting patterns in the following four legislative districts powerfully demonstrate the cynical restraint placed on the ability to strengthen and broaden minority political potential and also show an absence of an appropriate predicate for invoking the Voting Rights Act remedies.

1. House District 31 (House District 23 in 1981)—Hamilton County

Board Finding ¶ 182 states that this district's black population was increased to insure a black candidate was elected when Representative Mallory retired. Furthermore, the Board Findings indicate that Floyd Johnson, the man purporting to represent the NAACP, gave his approval for these racially gerrymandered districts. *Id.* at ¶ 8.[8]

A cursory glance at the Board Findings exemplifies that race was the most important factor in redrawing the districts. These Findings were adopted in support of the 1992 Plan now at issue.

Tilling's notes further indicate that prior to drawing this district he displayed the minority population on his computer screen and he drew this district first to empha-

[8] While Mr. Johnson caims to have represented the NAACP's wishes, the NAACP never officially sanctioned his work.

size a heavily populated black district. While this relates to a draft of the finished version, it indicates Tilling's and the Board's intent when drawing this district.

The Board should not have taken race into account at all in this district. In 1990, 50.66% of the white voters voted for the black representative. *Quilter*, 1992 WL 677145, at *10 n.2. Furthermore, 28.23% of the white voting age population voted, while only 12.63% of the black population did so. *Board Finding* at ¶ 168. The black voting age population was only 39% of the population in this district. Therefore, the black representative could have run in an all white district and won.

2. House District 39 (House District 37 in 1981)—Montgomery County

Paragraphs 191 to 193 of the Board's findings indicate that their primary concern in drawing new House District 39 was to circumscribe black voters. In fact, these findings seem to indicate that race was the Board's only concern.

The Board considered Old Districts 36 and 37 simultaneously, when they attempted to redraw the districts in Montgomery County. *Board Findings* at ¶ 191-93. Both of these districts had minority representatives, and in both districts minorities had been elected with less than a majority-minority population. *Id.* at ¶ 191. Yet, the Board found it imperative to increase the minority population in these districts. *Id.* at ¶ 193 ("But in order to barely give her the majority black voting age population, 50.7, which is, we felt, the least that we needed to do . . . if we didn't increase it now, it would fall dangerously low and possibly jeopardize her chances for reelection."). The Board did this and ignored the fact that in Old House District 37, 45.98% of the white voters crossed-over and voted for the black candidate. *Quilter*, 1992 WL 677145 at *10 n.2.

3. House District 44 (House District 42 in 1981)—Summit County

Again, the Board found it necessary to first consider race in District 44. In fact, both Floyd Johnson and the Black Elected Democrats of Ohio ("BEDO") participated in reconfiguring this district. *Board Findings* at ¶ 194. The Board, Floyd Johnson, and BEDO all agreed that the district needed to be reconfigured so as to have a larger black voting age population. *Id.* This was their sole and primary purpose in drawing District 44.

Once again, however, in Old District 42, the black representative received 48.76% of the white population's votes. *Quilter,* 1992 WL 677145, at *10 n.2. Furthermore, in that district blacks only made up 32.01% of the voting age population. *Board Findings* at ¶ 168. Thus, once again it was whites who elected a black candidate (the black representative had been elected to five terms by a two-to-one margin). Race should not have been considered here, but obviously was the primary consideration. Moreover, the Summit County districts showed population shifts that were constitutionally insignificant. *See Tilling's Report* at ¶ 49.

4. House District 49 (Old House District 45)—Lucas County

Mr. Tilling testified to the Board that in this district they did not need to increase the minority population to protect the incumbent black representative, "but because down the road in this decade whoever is his successor needs the opportunity to give minorities a clear chance to elect a candidate of their choice." *Board Findings* at ¶ 177. There obviously was a strategy to increase percentages based on race with no predicate existing for doing so. *Id.* at ¶ 195.

In 1990, the black representative received 44.46% of the white vote in Old District 45. *Quilter,* 1992 WL

677145, at *10 n.2. Blacks only made up 37.61% of the voting age population. *Board Findings* at ¶ 168. Finally, this district had very little shift in population. *Tilling's Report* at ¶ 49. The only reason it was changed was to increase the number of minority voters.

C. Strict Scrutiny

The record establishes a simple fact: Ohio voters in these state legislative contexts have demonstrated a "general willingness" to look beyond race in electing public officials. *Abrams,* 1997 WL 331802, at *12. With a well-established record of non-polarized voting in the challenged districts, the Apportionment Board's drawing of racially-packed legislative districts can only be the result of a predominant motivation to do so. Consequently, I would subject the plan to strict scrutiny.

Under strict scrutiny, the Defendants must show "not only that its redistricting plan was in pursuit of a compelling state interest, but also that 'its districting legislation is narrowly tailored to achieve [that] compelling state interest.' " *Shaw II*, 116 S. Ct. at 1902 (quoting *Miller*, 115 S. Ct. at 2490). In this case, the state asserts that compliance with section 2 of the Voting Rights Act is a compelling state interest. The Supreme Court has "assumed, without deciding, that compliance with § 2 can be a compelling state interest." *Abrams,* 1997 WL 331802, at *8. I believe that when the Supreme Court ultimately decides this issue, the Court will find that compliance with section 2 of the Voting Rights Act is a compelling state interest. *See Bush,* 116 S. Ct. at 1968-70 (O'Connor, J., concurring).; [sic] Maj. Op. at 20-21.

However, section 2 of the Voting Rights Act does not justify the compartmentalization of racial minorities into separate voting districts unless it is demonstrated that such action would promote their meaningful participation in the

political process. Thus, section 2 is far from a blind justification for race-based redistricting. Rather, the state must have an adequate basis in evidence to conclude that race-based redistricting is necessary to correct bigoted voting patterns so as to comply with the Voting Rights Act. *See Abrams,* 1997 WL 331802, at *8 ("A violation of § 2 occurs if 'it is shown that the political process leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial minority] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' ") (quoting 42 U.S.C. § 1973(b)).

Generally, to establish a *prima facie* case that a single-member redistricting plan violates section 2, three things must be shown: (1) that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group "is politically cohesive"; and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles,* 478 U.S. 30, 50-51 (1986) (referred to hereinafter as "*Gingles* factors"). Consequently, when a state has reliable information that indicates the relevant minority group could establish a *prima facie* challenge under section 2 of the Voting Rights Act to the existing districting plan, then it has a strong basis in evidence for concluding that it must engage in race-based redistricting to comply with section 2, and it has established a "compelling interest" for the remedial measures.

In this case, even if the court were to assume that the Defendants possessed information suggesting that a minority group could satisfy the first two *Gingles* factors, the Defendants could not satisfy the racial-bloc voting prong in the relevant districts. In fact, both this court and the Supreme Court previously held that on the basis of all the

evidence that racially polarized voting generally did not exist in Ohio's legislative elections. The Court noted the following:

> [A]ppellees [Plaintiffs in this case] have failed to demonstrate *Gingles*' third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The District Court specifically found that Ohio does not suffer from "racially polarized voting." Even appellees agree. Here, as in *Gingles*, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters."

Voinovich v. Quilter, 507 U.S. 146, 158 (1993) (internal citations omitted); *see also Quilter*, 1992 WL 677145, at *4, *8 & n.2, n.3 (holding that Ohio has coalitional voting, where whites cross over and vote for black candidates, and not polarized voting, where whites only vote for white candidates and blacks vote for black candidates). By relying on these precedents, I am not saying that the Apportionment Board could not take race into account unless and until it had been proven in a court that a violation of section 2 of the Voting Rights Act had occurred. A state is not required to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)). My point, however, is to emphasize that which should have been reasonably apparent to the Defendants: racially polarized voting does not exist in the contested districts. In the four districts at issue, between 45% and 51% of the white voters voted for the black candidate. *See Quilter*, 1992 WL 677145, at *10 n.2; *see id.* at *10 n.3 (finding that in 1984 56.7% of white voters voted

for the black incumbent, in 1988 60.2% of white voters voted for the black incumbent, and in 1988 67.8% of white voters voted for the black incumbent). Given the overwhelming evidence of coalitional voting in the challenged districts under the existing plan and given the fact that the Defendants had this information available to them before they adopted the 1992 plan, the Defendants could not reasonably conclude that the relevant minority group could establish a *prima facie* case of a violation of section 2 of the Voting Rights Act in the four relevant districts.[9] Consequently, the state does not have a compelling interest to use black voters as a proxy for its redistricting, and the plan should be struck down.

IV. Conclusion

The policy of racial political containment in this case removes the plan from the same category of remedial attempts present in jurisdictions where white voters continue in their refusal to vote on an interracial coalition basis for non-white candidates. Because of that difference, and the lack of an adequate predicate, the Apportionment Board, therefore, lacks a compelling interest for its racial containment scheme. The four districts at issue, as drawn, violate the Equal Protection Clause of the Fourteenth Amendment. I dissent.

/s/ Nathanial R. Jones
HONORABLE NATHANIEL R. JONES

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[9] The pending case is extremely similar to the facts of *Abrams v. Johnston* [sic], *supra*. In that case, the plaintiffs alleged a section 2 violation. The plaintiffs, however, could not establish the three threshold *Gingles* conditions. *Id.* at *8-9. In Georgia, the district court found that the "average percentage of whites voting for black candidates . . . ranged from 22% to 38% . . . ." *Id.* at *9. "Under these circumstances, we cannot say the district court clearly erred in finding insufficient racial polarization in voting to meet the *Gingles* requirements." *Id.* If the Court found insufficient racial polarization in Georgia, I have no doubt that they will find insufficient racial polarization in voting in Ohio.

[Filed Aug. 22, 1997]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5: 91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

vs.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

Judge Nathaniel R. Jones
Judge Karen Nelson Moore
Judge David D. Dowd, Jr.

JUDGMENT ENTRY

For the reasons set forth in the memorandum opinion filed contemporaneously with this Judgment Entry, final judgment is rendered for the defendants. Each party to pay its own costs. Case Closed.

/s/ Karen Nelson Moore
KAREN NELSON MOORE
U.S. Circuit Judge

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
Senior U.S. District Judge

APPENDIX B

[Filed Aug. 11, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5: 91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*. [sic]
Defendants.

Judge Nathaniel R. Jones
Judge Anthony J. Celebreeze, Sr.
Judge David D. Dowd, Jr.

OPINION

The question before this court is whether the Ohio Apportionment Board's consideration of race in its 1992 redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment. We hold that by virtue of demonstrated white and African American coalition voting for legislative seats in Ohio, and the failure of Defendants to demonstrate a compelling state interest for using race as the predominant factor in drawing legislative lines, certain districts in the 1992 plan are unconstitutional.

I. Background and Procedural History

Pursuant to the Ohio Constitution, the State Apportionment Board, comprised of five members, must reapportion

State House and Senate electoral districts for the state legislature every ten years.[1] Following the 1990 federal census, a majority of the Apportionment Board[2] appointed James R. Tilling to draft an apportionment plan on behalf of the Board. After conducting public hearings throughout the state, including meeting with some members of minority organizations, Tilling drafted a plan that included eight majority-minority districts, districts in which a majority of the population is a member of a specific minority group. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1153 (1993). On October 1, 1991, the Apportionment Board adopted the plan Tilling submitted by a 3-2 vote along party lines. *Id.* The three Republican members voted for the plan, and the two Democrats voted against it. The Board later reconvened on October 3, 1991, to make several technical amendments to the plan, and the

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[1] Article XI, Section 1 of the Constitution of the State of Ohio provides:

> The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.
>
> Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year [1971] and every tenth year thereafter.

Ohio Const., art. XI, § 1.

[2] The majority consisted of Defendants George V. Voinovich, Governor of the State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and Robert A. Taft, II, Secretary of State of Ohio. In the minority were Plaintiffs Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, and Thomas E. Ferguson, Auditor of the State of Ohio.

plan, adopted on October 3, 1991, in the wake of these changes, was designated "Amendment C."

On November 1, 1991, Barney Quilter and Thomas Ferguson, the two Democrats on the Board who voted against the plan, and various Democratic party officials and legislators filed suit against the Republican members of the Apportionment Board and Tilling.[3] Seeking invalidation of the plan, the Plaintiffs alleged that the redistricting plan violated section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution, which provided specific apportionment guidelines. *Voinovich v. Quilter*, 794 F. Supp. 695, 695-96 (N.D. Ohio 1992). According to the Plaintiffs, the Defendants intentionally "packed minorities into certain districts where minorities historically were able to elect representatives of choice with crossover votes." *Id.* at 698. The Plaintiffs contended that this packing resulted in a waste of minority votes in the packed districts and a dilution of minority voting strength in the surrounding areas where the "packed' voters could influence elections. *Id.* In response, the Defendants contended that the plan actually enhanced the strength of black voters by creating safe, minority-dominated districts. As justification for these changes, the Defendants cited compliance with the Voting Rights Act and federal case law, which allegedly mandated the drawing of majority-minority districts. *Id.*

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[3] The dissent claims that the Plaintiffs commenced this litigation "to wrest control of Ohio's reapportionment process from the majority of the Board and place it with the federal court system." Dissenting Op. at [2]. Obviously, such a charge could be leveled against any entity that chooses to challenge a state's infringement of its federal statutory or constitutional rights because it is one of the means to bring such a challenge. Nevertheless, this was not the end or purpose for which the Plaintiffs filed their claim. The Plaintiffs sought a reapportionment plan that was not racially discriminatory, and in filing suit with the federal court, they were simply utilizing the best means to accomplish that end.

On January 31, 1992, a majority of this three judge panel held that there was "no legal mandate or finding of a Voting Rights Act violation to justify Defendants' creation of majority-minority districts wherever possible in the 1991 apportionment plan." *Id.* at 701. Thus, we ordered the Board to draft a new plan or demonstrate that it was remedying a section 2 violation.[4] *Id.* at 702.

The Apportionment Board respondend by establishing and adopting a record on February 18, 1992, that, in its view, justified the Board's creation of minority-controlled state legislative districts. Furthermore at its February 18 meeting, the Board amended the 1991 plan to eliminate a series of technical errors in the plan that the Ohio Supreme Court had identified in its separate review of the plan, *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992). The resulting 1992 plan, "Amendment D," created only five majority-minority districts, however, a reduction from the eight majority-minority districts in the 1991 plan, "Amendment C."

On March 10, 1992, after the Board submitted its findings and conclusions, along with the new 1992 plan, this court held that the Board "fail[ed] once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965." *Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992). Furthermore, this court held that the 1992 plan also violated the Fifteenth Amendment of the United States Constitution. *Id.* Nine days later, in response to Defendants' motion for a stay of the March 10 order pending appeal to the United States Su-

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[4] We declined to address the Plaintiffs' constitutional claims at this point because our analysis under the Voting Rights Act required the plan to be justified or revised. Likewise, because the Ohio Supreme Court, in *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992) (per curiam), was concurrently considering the Plaintiffs' claim under the Ohio Constitution, we abstained from addressing the pendant claim.

preme Court, this court additionally held that both the 1991 and 1992 plans violated the Fourteenth Amendment because they departed from the requirement that all districts be of nearly equal population. *Quilter v. Voinovich*, No. 5:91CV-2219, 1992 WL 677145, at *10 (N.D. Ohio Mar. 19, 1992).

The Defendants appealed to the United States Supreme Court. In *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), the Supreme Court reversed this court's *Quilter* decisions. Denying two of the Plaintiffs' claims, the Court held that the reapportionment plan at issue did not violate section 2 of the Voting Rights Act, nor did it violate the Fifteenth Amendment to the United States Constitution. Nevertheless, the Court held that the Plaintiffs had established a *prima facie* case that the population deviations between the districts violated the Equal Protection Clause, and the Court remanded "only for further proceedings on whether the plan's deviation from equal population among districts violate[d] the Fourteenth Amendment." *Id.* at 1154.

Upon remand, we held that the Ohio reapportionment plan survived scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause because (1) the Defendants advanced a genuine, rational state policy to justify the deviations from population equality among the state legislative districts, (2) their plan reasonably furthered the rational state policy, and (3) the 13.81% and 10.54% total deviations fell within constitutional limits. *Quilter v. Voinovich*, 857 F. Supp. 579, 587 (N.D. Ohio 1994). Accordingly, judgment was entered for the Defendants on this issue.

While the latter decision was pending, however, the Plaintiffs moved this court for permission to amend their complaint in light of the Supreme Court's recent decision in *Shaw v. Reno*, 113 S. Ct. 2816 (1993).[5] As a lower

[5] In dissent, our colleague argues that the Plaintiffs were actually bringing another vote dilution claim rather than a *Shaw v. Reno* claim. Dissenting Op. at [16]. Actually, however, this case

court, we are bound of course, regardless of the strentgh of our reservations,[6] to follow the Supreme Court's decision in *Reno*, where the Court held for the first time that a plaintiff could state a claim under the Equal Protection Clause by alleging that a districting plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 2828. We granted the Plaintiffs' motion,[7] and their complaint was

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is simply a classic example that the same set of facts or circumstances may give rise to more than one cause of action. The Supreme Court clearly denied the Plaintiffs' vote dilution claim under section 2 of the Voting Rights Act, but the Court did not address whether the Apportionment Board's use of race in redistricting, ostensibly as a remedial measure pursuant to the Voting Rights Act, violated the Equal Protection Clause of the Fourteenth Amendment. *See Quilter*, 113 S. Ct. at 1157. The Plaintiffs have brought the latter challenge in the instant case.

[6] We note that critics of the Court's decision in *Shaw* have raised compelling concerns with which we sympathize. *See* A. Leon Higginbotham, Jr., et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Review 1593 (1994); Brief of the Congressional Black Caucus as *Amicus Curiae* in Support of Appellants, *United States v. Hays*, Nos. 94-558/627, 1995 WL 382080 (U.S. June 29, 1995).

[7] In dissent, our colleague renews his disagreement with our prior decision to allow the Plaintiffs to amend their Complaint and bring a *Shaw v. Reno* challenge to the reapportionment plan. Dissenting Op. at [4-5]; Supp. Dissenting Op. at [2 n.3]. The dissent alleges that our decision violated the mandate rule by exceeding the scope of the remand, and he claims that review of a *Shaw* claim actually "required a new lawsuit and a new draw, with a probable different three-judge panel." *Id.*

In our prior decision, we clarified that "while a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Quilter v. Voinovich*, 157 F.R.D. 36, 38-39 (N.D. Ohio 1994) (quoting *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (quotation omitted)). Under the mandate rule, we may not consider on remand the issues that the Supreme Court decided, but we may consider issues that have not been de-

accordingly amended.[8] *Quilter v. Voinovich*, 157 F.R.D. 36, 40 (N.D. Ohio 1994).

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cided. *See id.* at 39 (citing *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.), *cert. denied*, 113 S. Ct. 125 (1992); *see id.* at 39 n.1 (citing cases from other circuits holding the same). In this case, the Supreme Court expressly abstained from considering the type of Equal Protection Clause challenge delineated in *Shaw*. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1157 (1993). Thus, the Court's mandate did not prohibit us from considering the issue on remand.

To support the contention that the Plaintiffs' *Shaw* claim required a new lawsuit, new draw, etc., the dissent cites to some Local Rules that give direction with respect to the appropriate disposition of related cases that are filed separately. *See* Dissenting Op. at [5 n.2]; Supp. Dissenting Op. at [2 n.3]. Yet, these Local Rules would only apply if Plaintiffs had filed a new lawsuit alleging a *Shaw* claim. As such these Local Rules do not support the proposition that the Plaintiffs were "required to file a new lawsuit." Indeed, the dissent offers no supporting authority for this proposition, other than the case law cited in conjunction with the previous argument.

[8] The Plaintiffs' Second Amended Complaint revised the First Amended Complaint in only two respects. First, Count IV, entitled "Violation of the Equal Protection Clause—Segregation of Voters by Race Without Compelling Governmental Justification," is added. Second, the prayer for relief was accordingly revised. In pertinent part, Count IV alleges the following:

> 52. . . . The reapportionment plan adopted by the Defendants on February 18, 1992 intentionally separated Ohio voters on the basis of race without regard for the traditional redistricting principles set forth in the Ohio Constitution and otherwise without any compelling governmental justification. To justify the creation of race-based districts in the urban centers of Ohio, Defendants asserted that there was widespread racial bloc voting throughout Ohio. The trial court specifically found, and the Supreme Court of the United States confirmed, that Ohio did not suffer from legally cognizable racially polarized voting. . . .
>
> 53. The Defendants deliberately created race-based legislative districts in urban centers initially and then used the purported, but sham, necessity of creating such districts as the basis for ignoring the traditional anti-gerrymandering provisions of the Ohio Constitution throughout the state of Ohio. Absent the ripple effect of the racial gerrymandering in the

Having considered the record evidence and the arguments of the parties, both written and oral, we are prepared to issue our decision.[9] We preface our findings of fact and conclusions of law, however, with a discussion of the governing law that provides the analytical paradigm for our conclusions.

II. First Principles

A. Nature of a Shaw v. Reno *Claim*

Prior to the Supreme Court's decision in *Reno*, the Court had delineated only two legal theories to support

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urban centers of the state of Ohio, the Defendants would not have been forced to ignore on a wholesale basis the directives of Article XI, Section 7, of the Ohio Constitution to follow existing poiltical and legislative boundaries wherever possible.

54. . . . The decision to abandon the traditional districting mandates contained within the Ohio Constitution is neither compelled by the doctrine of federal supremacy, nor based on any lawful, organized, or rational districting criteria. . . .

55. The Defendants have articulated no compelling governmental interest for the wholesale abandonment of the provisions of the Ohio Constitution. As a result, the Defendants have drawn irregular districts in numerous places throughout the state, districts which have no explanation other than the ripple effects caused by the racially drawn districts in the urban centers. In some instances, the racially drawn districts themselves have irregular shapes not required by the Ohio Constitution.

56. The districts which have been modified solely on the basis of race include House Districts 31, 30, 22, 21, 38, 39, 44, and 49. No evidence has been presented to the trial court that either legally cognizable remedial action was necessary to draw these racially gerrymandered districts, or that the creation of such districts was narrowly tailored to further any compelling governmental need.

Pls.' Second Am. Compl. ¶¶ 52-56.

[9] The court also appreciated and considered an *amicus* brief submitted by the United States Department of Justice, which supported the position of the Defendants.

a redistricting challenge under the Equal Protection Clause of the Fourteenth Amendment: (1) violation of the "one-person-one-vote" principle, which requires that districts be equal in population so that the votes cast by voters in one district do not have less weight than those cast by voters in other districts, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); and (2) a claim of vote dilution, whereby districts are purposefully drawn to unfairly dilute or diminish the voting strentgh of an identified group of voters, *Rodgers v. Lodge*, 458 U.S. 613 (1982). *Shaw v. Hunt*, 861 F. Supp. 408, 421 (E.D.N.C. 1994), *probable jurisdiction noted*, 63 U.S.L.W. 3916 (U.S. June 29, 1995) (No. 94-923); *see also Reno*, 113 S. Ct. at 2822, 2823, 2828; *Miller v. Johnson*, Nos. 94-631/797/929, 1995 WL 382020, at *23 (U.S. June 29, 1995) (Ginsburg, J., dissenting). In *Shaw v. Reno*, however, the Court announced a third means to challenge legislative redistricting under the Equal Protection Clause. The Court held that "a plaintiff challenging a reapportionment [plan] under the Equal Protection Clause may state a claim by alleging that the [plan], though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 113 S. Ct. at 2828; *Miller*, 1995 WL 382020, at *3. The Court defined such a deliberate and arbitrary distortion of district boundaries for racial purposes as a "racial gerrymander."[10] *Reno*, 113 S. Ct. at 2823.

The Reno Court reasoned that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded

[10] The dissent does not find the Supreme Court's definition of racial gerrymandering "particularly enlightening in view of the apparent conflict of meaning between 'deliberate' and 'arbitrary' actions." Dissenting Op. at [17]. Evidently, the dissent has never recognized that someone deliberately can act in an arbitrary manner.

upon the doctrine of equality.'" *Id.* at 2824 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), and they "may serve to stimulate our society's latent race-consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs," *United Jewish Organizations v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part). These observations were reiterated in the Court's recent decision in *Miller v. Johnson*:

> When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." Race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution."

1995 WL 382020, at *7 (citations omitted).

For these reasons, the Court has held that racial gerrymandering by state legislatures demands close judicial scrutiny; thus, a race-based redistricting plan can be upheld only if it is narrowly tailored to further a compelling state interest. *Reno*, 113 S. Ct. at 2825, 2826, 2830; *Miller*, 1995 WL 382020, at *3, *7, *13; *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (noting that strict scrutiny applies not only to legislation that contains explicit racial classifications but also to those "rare" statutes that are "unexplainable on grounds other than race," even though they are race-neutral on their face). Consistent with prior

practice, the *Reno* Court made clear that because a racial gerrymander is a racial classification, it must be reviewed with strict scrutiny even if the drafters of the redistricting plan claim that the plan was drawn with the "benign" purpose of enchancing minority voting strength, 113 S. Ct. at 2830 ("Equal Protection Clause demands strict scrutiny of all racial classifications . . . because without it, a court cannot determine whether or not the discrimination truly is "benign."); *id.* at 2826 ("[D]istrict lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption."), or claim that the racial gerrymander benefits or burdens the races equally, *id.* at 2829 (citing *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 1370 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree."); *see also Miller*, 1995 WL 382020, at *3 (noting that racial and ethnic distinctions of any sort are inherently suspect and require exacting judicial scrutiny regardless of the race of those burdened or benefited by the classification).

Although the Court in *Reno* clearly created a new means to challenge state apportionment plans pursuant to the Fourteenth Amendment, its analysis left many unanswered questions that are integral to the proper resolution of a *Shaw v. Reno* claim: (1) Is circumstantial evidence of "bizarre" district shapes necessary to state and sustain a *Shaw v. Reno* claim?; (2) To what extent must "race" be a factor in an apportionment plan before the plan becomes a racial gerrymander subject strict scrutiny analysis?; (3) Once strict scrutiny is triggered, who has the burden of proof in a *Reno* claim?; (4) What constitutes a "compelling state interest" that would justify race-based redistricting?; and (5) What is the meaning of "narrowly tailored" in the redistricting context? Some of these questions were answered subsequently in the Court's *Miller* decision. We turn now to consider these issues.

B. Bizarre District Shapes: A Necessary Element?

Relying on *Reno*, the Defendants contend that strict scrutiny is not required in this case because "Plaintiffs have not established that any of the districts in [the 1992 plan] are 'bizarre' or 'irregular.'" Defs.' Post Trial Br. at 55. This raises the question of whether the presence of bizarre district shapes is a necessary element or a threshold requirement to state a *Shaw v. Reno* claim.

Undeniably, the Court in *Reno* emphasized that the new cause of action under the Fourteenth Amendment was based on the presence of districts whose shapes were so irregular or bizarre that they rationally could not be understood as anything other than an effort to segregate voters on the basis of race. 113 S. Ct. at 2828, 2832. Such districts, however, do not draw close constitutional review simply because of their irregular shape. Adherence to traditional districting principles, such as compactness, contiguity, and respect for political subdivisions, is not a constitutional requirement. *Id.* at 2827 (citing *Gaffney v. Cummings*, 412 U.S. 735, 752 & n.18 (1973)). Rather, bizarre-shaped districts demand strict scrutiny because their shape is circumstantial evidence that race has been a purposeful factor in their creation. *See Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring) ("One need not use Justice Stewart's classic definition of obscenity—'I know it when I see it'—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation." (footnotes omitted)). Logically, therefore, the Supreme Court's use of a district's shape as circumstantial evidence of racial intent implies that proof can be made "by any means, including state concession, bizarre shape, or some combination of the various factors typically used to prove the 'intent' element of an equal protection claim under *Arlington Heights*." *Hunt*, 861 F. Supp. at 431; *see Arlington*

Heights, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

The validity of this reasoning was recently confirmed by the Court in *Miller*:

> Our observation in *Shaw* of the consequences of racial stereotyping was not mean to suggest that a district must be bizarre on its face before there is a constitutional violation. Nor was our conclusion in *Shaw* that in certain instances a district's appearance (or, to be more precise, its appearance in combination with certain demographic evidence) can give rise to an equal protection claim, 509 U.S., at —— (slip op., at 17), a holding that bizarreness was a threshold showing, as appellants believe it to be. Our circumspect approach and narrow holding in *Shaw* did not erect an artificial rule barring accepted equal protection analysis in other redistricting cases. Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines. The logical implication, as courts applying *Shaw* have recognized, is that parties may rely on evidence other than bizarreness to establish race-based districting.

1995 WL 382020, at *8. Thus, "parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness" in order to state a valid *Shaw v. Reno* claim. *Miller*, 1995 WL 382020, at *9.

Now that we have discussed the types of evidence that a party can marshall to sustain a *Shaw v. Reno* claim, we turn to consider both the extent to which race must be a factor in an apportionment plan before the plan becomes a racial gerrymander subject to strict scrutiny and the party that bears that burden of proof.

C. The Trigger for Strict Scrutiny

The Court in *Reno* did not specify the threshold showing of racial consideration that was necessary to establish that a redistricting plan was a racial gerrymander requiring close judicial scrutiny. The Court did, however, narrow the spectrum by significantly reiterating the principle that "awareness" of race or "race consciousness" in the districting process is not equivalent to a racial gerrymander that requires strict scrutiny analysis:

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

113 S. Ct. at 2826 (emphasis in original).

In *Miller v. Johnson,* the Court clarified the burden of proof necessary to trigger strict scrutiny:

> Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed. . . . The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the *predominant factor* motivating the legislature's decision to place a significant number of voters

> within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district had been gerrymandered on racial lines."

1995 WL 382020, at *10 (citations omitted and emphasis added).

Despite this clarification, there remains some ambiguity regarding the *Miller* "predominant factor" test. Specifically, what did the majority mean when it said that a plaintiff must prove that the legislature "subordinated" traditional districting principles to racial considerations in order to trigger strict scrutiny? Does this mean that a plaintiff must prove that the legislature disregarded or abandoned traditional districting principles in favor of racial considerations or does it mean that strict scrutiny will be triggered even if a state legislature follows traditional districting principles, simply because those principles were accorded less emphasis or less weight than racial considerations?

The ambiguity inherent in the *Miller* Court's predominant factor test is highlighted by the concurring opinion of Justice O'Connor and the dissenting opinion of Justice Ginsburg. Although no other justice joined her opinion, Justice O'Connor wrote separately to emphasize her understanding of the Court's predominant factor test:

> I understand the threshold standard the Court adopts—"that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations,"—to be a demanding one. To invoke

> strict scrutiny, a plaintiff must show that the State has relied on race *in substantial disregard* of customary and traditional districting practices.

Miller, 1995 WL 382020, at *17 (O'Connor, J., concurring) (citation omitted and emphasis added). Justice Ginsburg in dissent, joined by Justice Stevens, Breyer, and Souter, interpreted the Court's new predominant factor test differently:

> Today the Court expands the judicial role, announcing that federal courts are to undertake searching review of any district with contours "predominantly motivated" by race: "strict scrutiny" will be triggered not only when traditional districting practices are *abandoned*, but also when those practices are *"subordinated to"—given less weight* than race. Applying this new "race-as-predominant-factor" standard, the Court invalidates Georgia's districting plan even though Georgia's Eleventh District, the focus of today's dispute, bears the imprint of familiar districting practices.

Id. at *21 (Ginsburg, J., dissenting) (citation omitted and emphasis added).

The majority, itself, recognized, as it had in *Shaw*, 113 S. Ct. at 2827, that a legislature's compliance with traditional districting principles may well suffice to defeat a claim of racial gerrymandering, but such a refutation was not possible in *Miller* because the Court found that the State of Georgia had subordinated those factors to racial objectives. *Miller*, 1995 WL 382020, at *12. As proof of subordination, the majority pointed to an objection of Georgia's Attorney General that was lodged with the Justice Department in response to the Justice Department's demand for three majority-black districts in Georgia. *Id.* The State Attorney General claimed that to comply with such a demand the State would have to

" 'violate all reasonable standards of compactness and contiguity.' " *Id.* The Court found such a statement to be "powerful evidence that the legislature subordinated traditional districting principles to race when it ultimately enacted a plan creating three majority-black districts." *Id.* Nevertheless, a fair interpretation of this language does not lead to the conclusion that "subordination" can only be proven if a state abandons or violates traditional districting principles in favor of racial considerations. In fact, as Justice Ginsburg pointed out in dissent, Georgia's Eleventh District, which the majority held to be an example of "subordination," actually bore "the imprint of familiar districting practices." *Id.* at *21 (Ginsburg, J., dissenting); *id.* at *24-25 (Ginsburg, J., dissenting) (noting specifically how the Eleventh District's design reflects the significant consideration of traditional districting factors).

Moreover, the conclusion that "subordination" can only be proven if a state abandons or violates traditional districting principles in favor of racial considerations constitutes a logical fallacy. The presupposition of such a conclusion is that if districts are drawn on the basis of traditional districting principles—compactness, contiguity, etc., then such districts cannot be the result of racial gerrymandering. Such a conclusion is fallacious because it is certainly possible, both logically and factually, that districts could be crafted within the confines of traditional districting principles and still be predominantly motivated by racial considerations at the same time. Furthermore, to conclude otherwise accords a preclusive constitutional significance to a state's compliance with traditional districting principles, which exceeds the significance accorded by the Court. *See Reno*, 113 S. Ct. at 2816.

Taken together, all of this language leads us to conclude that a plaintiff may satisfy the predominant factor test and prove that traditional districting principles were subordinated to racial objectives not only when a state

violates or abandons traditional districting principles in favor of racial motivations but also when a state substantially complies traditional districting principles and gives them less weight in the apportionment process than racial considerations.

Although the Plaintiffs in this equal protection challenge bear the ultimate burden of persuasion throughout the proceeding, *see id.* at *10; *Batson v. Kentucky*, 476 U.S. 79, 93-94 & n.18 (1986); *Wygant*, 476 U.S. at 277-78, if the Plaintiffs offer proof substantiating that race was the predominant factor motivating the state's apportionment process, then this gives rise to a presumption that the plan is unconstitutional, and the burden shifts to the Defendants to demonstrate that their use of race was narrowly tailored to meet a compelling state interest, *see Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436. Yet, the Defendants' shifted burden is one of production only, not persuasion. The Plaintiffs still bear the ultimate burden of persuading the court that the Defendants did not have a compelling state interest that justified their use of race in apportionment process or that the Defendants' redistricting plan was not narrowly tailored to meet such an interest. *See Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring); *Hunt*, 861 F. Supp. at 436.

D. Compelling State Interest

Next, we consider those reasons that might serve as a compelling state interest, justifying a state's decision to engage in race-based redistricting. At this point, we are not concerned with whether the Defendants in this case had a compelling justification for their consideration of race in the 1992 plan; we are concerned with whether the Defendants had a compelling justification for *any* redistricting plan that considered race as a predominant factor. The question of "whether the particular plan under challenge takes race into account to a greater degree than

necessary to further a compelling state interest is a question for the 'narrowly tailored' prong of the strict scrutiny analysis, which examines the 'fit' between the compelling state itnerest and the precise means chosen by the state to accomplish it." *Hunt*, 861 F. Supp. at 437 (citing *Wygant*, 476 U.S. at 280 & n.6, and *Fullilove*, 448 U.S. at 507 (Powell, J., concurring)). Without presenting an exhaustive review of those reasons that thetoretically might serve as a compelling state interest in the redistricting context, we have chosen to limit our discussion to the compelling interest that the Defendants have offered in this case—compliance with section 2 of the Voting Rights Act. Defs.' Post Trial Br. at 57-63.

In *Shaw v. Reno*, the state argued that compliance with the Voting Rights Act was a compelling state interest. 113 S. Ct. at 2830. The Court, however, stopped short of totally endorsing this claim: "The states certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied." *Id.*; *see Miller*, 1995 WL 382020, at *13. Obviously, the Court is aware that in strict scrutiny parlance a "compelling state interest" is a term of art. Thus, we do not think the Court's choice of the words "very strong interest" is insignificant. It suggests to us that the Voting Rights Act may serve as a compelling state interest in some circumstances, but in others, state action ostensibly in conformity therewith may violate the Equal Protection Clause of the Fourteenth Amendment. *See Miller*, 1995 WL 382020, at *13; *see also Johnson v. De Grandy*, 114 S. Ct. 2647, 2666-67 (1994) (Kennedy, J., concurring) ("Given our decision in *Shaw*, there is good reason for state and federal officials with responsibilities related to redistricting [that are engaging in remedial action pursuant to section 2 of the Voting Rights Act], as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting

must comply with the overriding demands of the Equal Protection Clause.").

Previously, the Court has recognized a state's compelling interest in taking race-based remedial measures to eradicate the effects of past racial discrimination. *Miller*, 1995 WL 382020, at *13 (citing *Reno*, 113 S. Ct. at 2831 (citing *Croson*, 488 U.S. at 491-93; *Wygant*, 476 U.S. at 280-82)). Furthermore, the Court has recognized that this interest extends to remedying past or present violations of federal statutes that were intended to eliminate discrimination in specific aspects of life. *See Croson*, 488 U.S. at 500 ("constitutional or statutory violation"); *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring) ("violation of federal statutory or constitutional requirements"). Moreover, the Court has clarified that a state does not have to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277); *Miller*, 1995 WL 382020, at *13, *14; *Hunt*, 861 F. Supp. at 437.

Applying these principles to the redistricting context and the Voting Rights Act, the *Hunt* court developed a very useful standard by which to determine when the Voting Rights Act can serve as a compelling state interest:

> Under these principles, we think it clear that a state has a "compelling" interest in engaging in race-based redistricting to give effect to minority voting strength whenever it has a "strong basis in evidence" for concluding that such action is "necessary" to prevent its electoral districting scheme from violating the Voting Rights Act.
>
> . . . .

> A state has a "strong basis in evidence" for concluding that it must engage in race-based redistricting in order to comply with the Voting Rights Act when it has information sufficient to support a *prima facie* showing that its failure to do so would violate the Act. *See Croson*, 488 U.S. at 500 (majority) (evidence "approaching a prima facie case of a constitutional or statutory violation").

Hunt, 861 F. Supp. at 437-439; *see Johnson v. Miller*, 864 F. Supp. 1354, 1381 (S.D. Ga. 1994), *aff'd*, 1995 WL 382020 (U.S. June 29, 1995).

Generally, to establish a prima facie case that a single-member redistricting plan violates section 2 of the Voting Rights Act, a plaintiff must show three things, the *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))); *Johnson*, 864 F. Supp. at 1387; *Hunt*, 861 F. Supp. at 440. Thus, when a state has reliable information that indicates the relevant minority group could establish a prima facie challenge under section 2 of the Voting Rights Act to the existing districting plan, then it has a "strong basis in evidence" for concluding that it must engage in race-based redistricting to comply with section 2 of the Voting Rights Act, and it has established a "compelling interest" for the remidal measures. *Hunt*, 861 F. Supp. at 440.

E. Narrowly Tailored

Finally, we consider how to determine whether a racial gerrymander, if justified by a compelling state interest, is narrowly tailored to further that interest. The Court provided little help with this issue in *Reno,* other than to say that in the context of a challenge under section 5 of the Voting Rights Act, "[a] reapportionment plan would not be narrowly tailored if the State went beyond what was reasonably necessary to avoid retrogression." Therefore, we agree with the *Hunt* court that the best analytical approach is to examine the Court's decisions that apply the narrowly tailored standard in other race-based remedial contexts. *See Hunt,* 861 F. Supp. at 444-45.

In other race-based contexts, the Court has examined five factors to determine whether a race-based affirmative action plan is narrowly tailored to serve the compelling state interest in remedying the discrimination: (1) the efficacy of alternative remedies that were less race-based or race-neutral; (2) whether the plan utilizes a fixed racial quota or a flexible racial goal; (3) the duration of the plan; (4) the relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates; and (5) the impact of the plan on the rights of third parties. *See United States v. Paradise,* 480 U.S. 149, 171-85 (1987) (plurality); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC,* 478 U.S. 421, 485-89 (1986) (Powell, J., concurring); *see also Croson,* 488 U.S. at 507-08; *Wygant,* 476 U.S. at 279-84. Although these criteria were developed in contexts other than race-based redistricting, we think they are easily adapted to this context. While we have engaged in a rigorous analysis, our inquiry has been careful and sensitive.

Considering the first factor, a court must decide whether the state could have accomplished its compelling interest

by some means that were less race-based or race-neutral. *Wygant*, 476 U.S. at 280 n.6. If compliance with the Voting Rights Act is a state's compelling interest then, obviously, a race-neutral alternative does not exist. Assuming race must be considered to comply with the Voting Rights Act, the question then becomes whether a state could have complied with the Voting Rights Act with means that were less race-based. The Plaintiffs in this case do not allege that the Apportionment Board created more majority-minority districts than is reasonably necessary to comply with the Voting Rights Act. Rather, they generally claim that the Board packed black voters into districts to comprise less than a majority, where a black minority population, in conjunction with significant white crossover votes, already had ample opportunity to elect the candidate of its choice without the addition of the black voters. This packing of black voters into districts where they were not needed allegedly resulted in a waste of black votes in the "packed" districts and a loss of minority "influence" in those districts where the black voters were previously located. Assuming *arguendo* that such race-based measures truly further compliance with section 2 of the Voting Rights Act, the analytical question becomes a two-fold concern: whether the 1992 plan creates more "packed" districts than is reasonably necessary to comply with the Act and whether the "packed" districts it creates contain substantially larger concentrations of minority voters than is reasonably necessary to give minority voters a realistic opportunity to elect representatives of their choice in those districts. *See Hunt*, 861 F. Supp. at 446.

Regarding the second factor, a court must determine whether the challenged plan requires a fixed racial quota that is crafted to achieve a racial balance or requires a flexible goal to be used as a standard in gauging the state's efforts at eradicating the discrimination in question. *See Sheet Metal Workers*, 478 U.S. at 477-78. We agree with

the *Hunt* court that racial gerrymanders will "seldom be invalid on this ground" because they do not impose a fixed racial quota. 861 F. Supp. at 446. Even if a state creates a certain number of districts that are designed to elect minority representatives, there is no guarantee that minority representatives will be elected. Thus, such districts can hardly be viewed as anything other than examples of an acceptable, flexible goal for minority representation. *See Sheet Metal Workers*, 478 U.S. at 487-88.

The third factor invokes consideration of the planned duration of the remedial measure. If it is not a temporary provision, it may last longer than reasonably necessary to eliminate the effects of the targeted discrimination. *See id.* at 479 (noting that a temporary race-based remedial measure is acceptable because it "will end as soon as . . . it is no longer needed to remedy past discrimination"). A race-based redistricting plan in Ohio will likely satisfy this test because the State is required, as a practical matter, to redistrict after each decennial census, and this will result in re-consideration and possible termination of the previous race-based plan.

The fourth factor requires the court to consider whether the remedial plan presents a reasonable relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates. As applied to the redistricting context, we think this requirement is satisfied so long as the percentage of racially-packed districts does not substantially exceed the percentage of minority voters throughout the state. *See Johnson v. De Grandy*, 114 S. Ct. at 2658 & n.11 (noting that ultimate right of section 2 of Voting Rights Act is minority voters' equal opportunity to elect candidate of their choice, as measured by proportionality between percentage of majority-minority voting districts in state to minority members' share of the relevant population throughout the state).

The fifth factor requires a court to consider whether the challenged plan "impose[s] an unacceptable burden on innocent third parties." *Paradise*, 480 U.S. at 182. As applied to the redistricting context, we agree with the *Hunt* court that "a race-based redistricting plan imposes an unacceptable burden upon third parties, [and] hence is not sufficiently 'narrowly tailored' to survive constitutional muster, if it fails to comply with redistricting principles that are themselves constitutionally mandated, like the 'one person, one vote' standard and the prohibition against undue dilution of the voting strength of any identifiable group of voters." *Hunt*, 861 F. Supp. at 449. Like the *Hunt* court, however, we do not think that a racial gerrymander imposes an unacceptable burden on third parties simply because the redistricting plan has a bizarre shape or deviates from traditional districting principles, which, themselves, are not constitutionally mandated.[11] *Id.* at 449-56.

At this point we note that it is important for all the issues presented in this case to be analyzed in a way that gives expression to the constitutionally and statutorily based national goal of protecting the rights of persons victimized by historic discrimination, so that they may effectively participate in changing public policies to "ensure nondscrimination and far opportunities in education, employment, housing, and other areas." Arthur A. Baer & Pamela S. Karlan, *Voting Rights Act Enforcement: An Agenda for Equal Electoral Opportunity, in New Chal-*

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[11] Consider the words of Chief Justice Warren Burger in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), where the Court considered and approved the use of race-sensitive remedies to combat segregated schools: "The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations; and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system." *Id.* at 28.

lenges, The Civil Rights Record of the Clinton Administration Mid-term 169 (Report of the Citizen's Commission on Civil Rights, 1995). Court decisions of today must be mindful of the Supreme Court's admonition over one hundred years ago in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), that the right to vote is a "fundamental political right, because preservative of all rights." The issue presented in this case must not be responded to in such a way as to gut the Voting Rights Act's promise of equal electoral opportunity. When minority voters are deliberately and purposefully packed into a district where they are unnecessary to the election of the minority's candidate of choice, who is capable of "changing public policies," such a plan must be justified by a compelling governmental purpose. This is particularly true when the effect of such a scheme is likely to be to reduce the opportunity for minority voters to coalesce with other voters to influence the election of candidates of their choice in the districts from which they are drawn. When this occurs the very spirit of the Voting Rights Act is eroded. The risk has prompted us to reject portions of the 1992 plan at issue here.

III. Findings of Fact and Conclusions of Law

Based on our review of the evidence submitted by both parties, we find, for the following reasons, that racial considerations were the predominant factor in the Defendants' 1992 reapportionment plan:

1. The Plaintiff's claims of racial gerrymandering are somewhat unusual in this case. First, they allege that the Defendants drew race-based legislative districts in the urban areas of Ohio and that this decision had the ripple effect of causing irregular shaped districts throughout the State, which violated the traditional districting principles embodied in the Ohio Constitu-

tion, particularly Article XI, § 7. Pls.' Second Am. Compl. ¶ 55. In addition, the Plaintiffs alleged that some of the race-based districts, themselves, had irregular shapes in violation of the traditional districting principles contained in the Ohio Constitution. *Id.* Finally, the Plaintiffs alleged that the racially gerrymandered districts "included" House districts 31, 30, 22, 21, 38, 39, 44, and 49. *Id.* ¶ 56. The Defendants contend that the Plaintiffs are limited to challenging only these eight districts, which were identified in their complaint. The Defendants, however, mischaracterize the Plaintiffs' complaint. The word "included" clearly is not an exclusive term. Thus, the eight districts identified in the complaint were illustrative of the alleged race-based districts but not necessarily an exclusive listing of them. That said, however, we note that we are not concerned with districts whose irregular shape may have been the ripple effect of another district that was racially gerrymandered. Such an irregular district may indeed violate proscriptions of the Ohio Constitution, but the focus of a *Shaw v. Reno* claim is racial gerrymandering in violation of the Fourteenth Amendment to the United States Constitution. Thus, we are only concerned in this case with districts that allegedly have been racially gerrymandered.

2. The Defendants admittedly considered race when drafting their 1992 apportionment plan. The Apportionment Board instructed Tilling to "draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act," and Tilling attempted to comply. Hr'g Tr. at 208. Tilling considered race to avoid dilution of minority voting strength in violation of the Voting Rights Act. *Id.* at 308.

3. Before Tilling drafted an apportionment plan, he attended public hearings throughout the state. At these hearings the Apportionment Board heard testimony from some members of the minority community requesting the Board to enhance minority voting strength by creating more majority-minority districts. Defendants' Post-Trial Br. at 2-3. At these hearings, Tilling publicly stated that consideration of and compliance with the Voting Rights Act was an important principle guiding the apportionment process. *Id.* at 3-5.

4. The Apportionment Board's Findings and Conclusions, adopted on February 18, 1992,[12] in support of the 1992 plan, reveal not only that race was a substantial and motivating factor in the reapportionment process but that it was the predominant factor in certain house districts. Based on the conclusions that the Voting Rights Act protected classes of voters, not incumbents, *see, e.g.*, Bd. Findings ¶¶ 177, 183, and that racial bloc voting existed throughout the State of Ohio, including districts containing minority voters, *id.* ¶¶ 124, 167, the Apportionment Board decided that it needed to create districts that would contain sufficient black population to guarantee the election of any new (non-incumbent) black candidate. Thus, the Board through Tilling added black voters to minority districts outside of Cuyahoga County because "there [wa]s insufficient black population in the minority districts to guarantee the election of a black candidate particularly given levels of voter turnout and racial bloc voting in the district." *Id.* ¶ 168. Obviously, one of the working assumptions in this process was that black voters would

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[12] The Apportionment Board has not met since February 18, 1992, either to change or modify its findings regarding the 1992 plan. Thus, these findings constitute direct evidence of the Apportionment Board's rationale and justification for the 1992 plan.

choose only a black candidate as their representative. This is clearly one of the demeaning and offensive assumptions that the Supreme Court has previously criticized as an impermissible racial stereotype. *See Miller*, 1995 WL 382020, at *7 (citing *Reno*, 113 S. Ct. at 2827).

5. The Board's analysis of incumbency elections in minority districts for 1984, 1986, 1988, and 1990, revealed an incumbency advantage of six to ten percent, *id.* ¶ 171, 173, and the Board concluded that it was unreasonable to configure districts based on the current incumbent because the successful incumbents might retire, die, or move on to other political positions during the 90's, *id.* at 172. *See also* Bd. Conclusion of Law ¶ 9 ("It is unreasonable to reconfigure minority districts based on the electoral success of minority incumbents. Further, such reconfiguration will result in impermissible minority vote dilution. Consideration of factors such as racial bloc voting, voter turnout, population shifts, demographics, incumbency factors, voting patterns and other such factors require that minority districts outside Cuyahoga County must reflect increased relative percentage of black voting age population.") Accordingly, the Board determined that "unless Black Voting Age Population margins are adopted in minority districts, minorities risk losing minority districts." Bd. Findings ¶ 174.

6. In Franklin County, the Board drew district lines to enhance the possibility of electing a new black candidate. Board Finding 189 indicates that Tilling "reconfigured House districts 29 and 31 in Franklin County to protect minority voters in those districts and to create a minority Senate District in Franklin County where none previously existed." *Id.* ¶ 189. Tilling testified that the incumbent black legislators, Reps. Miller and Beatty, had indicated a desire to

run for different offices, and because the Voting Rights Act protects classes of voters and not incumbents, black voters were added to the districts of Reps. Miller and Beatty to achieve this goal. *Id.* ¶ 189. The percentage of black population in Rep. Miller's district, H.D. 22 under the 1992 plan, was increased from 38.50% to 44.68% (40.98% black voting age population), a 6.18% increase, which is within the 6-10% standard that would be necessary to compensate for the possible loss of incumbency advantage. Defs.' Supp. Exs., Vol. I, Ex. DD. Likecise, the black population in Rep. Beatty's district, H.D. 21 under the 1992 plan, was increased from 46.80% to 54.30% (48.30% black voting age population) an increase of 7.50%. *Id.* Both Miller and Beatty previously had been elected to six and seven terms, respectively, Bd. Findings ¶ 162, by pluralities of better than two-to-one.

7. In Lucas County, the Board drew lines to enhance the possibility of electing a new black candidate. Tilling stated that he drew the districts in Lucas County "to protect a class of voters, not the particular incumbent in that situation." *Id.* ¶ 177. Tilling added additional minority votes to Rep. Casey Jones' district, H.D. 49 under the 1992 plan, "not because Casey Jones needed them but because down the road in this decade whoever is his successor needs the opportunity to give minorities a clear chance to elect a candidate of their choice." *Id.* Moreover, Tilling accepted the rationale of increasing minority voters in Casey Jones district because the growth of the University of Toledo had displaced a number of individuals, causing some shift of population in his district, and because Jones might be nearing retirement age. *Id.* ¶ 195. The black population in Jones' district was increased from 41.70% to 49.99% (46.42% black voting age population), an increase of 8.29%. Defs.' Supp. Exs., Vol. I, Ex. DD.

8. In Summit County, the Board drew lines to enhance the possibility of electing new black candidates. Based on the conclusion that Rep. Vernon Sykes' district, H.D. 44 under the 1992 plan, was "losing black population and to avoid minority vote dilution," Bd. Findings ¶ 194, the Board increased the black population in Sykes' district from 35.40% to 43.07% (39.86% black voting age population), an increase of 7.67%, Defs.' Supp. Exs., Vol. I, Ex. DD. Previously Sykes had been elected to five terms by margins of two-to-one. Bd. Findings ¶ 162.

9. In Montgomery County, the Board drew lines to guarantee the election of new black candidates. Again, based on "population shifts" and the desire to "avoid dilution of minority voting," the Board increased the black population in Rep. McLin's and Rep. Roberts' districts, H.D. 38 and H.D. 39, respectively under the 1992 plan. *Id.* ¶ 193. The black population in McLin's district was increased from 42.10% to 44.47% (41.56% black voting age population), an increase of 2.30% and the black population in Roberts' district was increased from 36.10% to 40.69% (36.71% black voting age population), an increase of 4.59%. Defs.' Supp. Exs., Vol. I, Ex. DD.

10. In Hamilton County, the Board drew lines to enhance the possibility of electing new black candidates. The Board found the following:

> Mr. Tilling, in drafting the 1991 Apportionment Plan, also determined that the Voting Rights Act protected classes of voters not incumbents. Since Representative Mallory is in his 60's, there is a particular need to reconfigure House District 23 [H.D. 31 in the 1992 plan] to increase the relative percentage of black population in that district in order to provide an opportunity for a new black candidate, without

the benefit of incumbency, to be elected in the district.

Bd. Findings ¶ 183. Accordingly, the Board increased the black population in Mallory's district from 45.90% to 49.16% (43.13% black voting age population), an increase of 3.26%. Defs.' Supp. Exs., Vol. I, Ex. DD. The Board also increased the black population in Rep. Rankin's district, H.D. 30 in the 1992 plan, from 53.20% to 55.98% (52.72% black voting age population), an increase of 2.78% in a district that was already a majority-minority district. *Id.* The Board increased the black population in Rankin's district allegedly because "[a] new black candidate would require a district with increased black population to be successful." Bd. Findings ¶ 186.

11. In addition to the Apportionment Board's Findings and Conclusions, Tilling, who was the principal architect of the apportionment plan, kept handwritten notes that indicated his procedure and his predominant use of race in drawing the original apportionment plan. *See* Pls.' Ex. Prior Proceeding B, No. 120. The notes revealed that in his first five steps Tilling calculated the ideal population size of the Senate and House districts, pursuant to Article XI, Section 2 of the Ohio Constitution, and determined those counties that had populations within five percent of the ideal in accordance with Article XI, Section 10 of the Ohio Constitution. Beginning with step six and continuing with each urban county thereafter, the notes repeatedly indicate that Tilling displayed the minority population of each urban county on his computer screen and then drew the "minority districts" first before proceeding. This process and the the heightened attention to racial composition was confirmed at the hearing when Tilling testified concerning the maps of the urban districts drawn in accordance with the process contained in the

notes. Hr'g Tr. at 344-51. Viewed sequentially, the maps indicated that for each urban county, the minority population was displayed; the most heavily black districts were drawn first; and each succeeding district that was drawn contained a decreasing percentage of black population. The Plaintiffs claim that the maps in conjunction with the notes establish that race was "the predominant concern of Mr. Tilling and the Board." Pls.' Post Trial Br. at 14. The Defendants contend that Tilling's notes and the corresponding maps are irrelevant because they refer to the original "model" plan that Tilling submitted to the Board on September 26, 1991. Although it is true that this exact plan was never in effect and was modified on numerous occasions, we still find it probative of the Defendants' predominant consideration of race in the redistricting process. The fact remains that a not-too-distant forerunning of the 1992 plan was drawn in the aforementioned manner, and the Defendants do not contend that the 1992 plan totally discarded the procedure and results of the original plan.[13]

12. At this point we note that for purposes of this case, we assume without holding that the Apportionment Board substantially complied with the traditional dis-

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[13] Originally, the dissent agreed that the notes of Tilling "strongly suggest[ed] that he purposefully considered race when he drew the house district boundaries in Amendment D" and that this evidence of race-based action should trigger strict scrutiny. Dissenting Op. at [17 n.9]; *see also* Dissenting Op. App. A ¶¶ 21, 23, 30, 38, 45, 53, 60, 68, and 75. In light of the Supreme Court's adoption of the predominant factor test in *Miller*, however, the dissent has changed its position and decided that Tilling's notes are not sufficient to trigger strict scrutiny. Supp. Dissenting Op. at [5 & n.4]. Nevertheless, the dissent continues to ignore totally the better and more complete direct evidence of the Board's race-based redistricting that was contained in the Board's Findings and Conclusions, which were adopted specifically in support of the 1992 plan. *See supra* part III., [sic] ¶¶ 4-10.

tricting principles mandated in Article XI of the Ohio Constitution. Based on our earlier analysis of the *Miller* Court's predominant factor test, *see supra* part II.C., we find it unnecessary to specifically address whether the Defendants complied with the traditional districting principles contained in the Ohio Constitution because even if a state substantially adheres to traditional districting principles, a plaintiff can still prove that racial objectives were the predominant factor in the apportionment process if traditional districting principles were subordinated to—given less weight than—racial considerations. *See Miller*, 1995 WL 382020, at *10; *id.* at *21 (Ginsburg, J., dissenting). Nevertheless, we note that the Board's compliance with the traditional districting principles in the Ohio Constitution is a hotly contested matter, *see* Pls.' Post-Hr'g Br. at 36-49, on which we have previously chosen to abstain, *see Quilter*, 794 F. Supp. at 702.[14]

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[14] Were we to decide to consider this issue, however, we note that as a preliminary matter we would have to decide whether this court was precluded from addressing the constitutionality of the 1992 plan under Article XI of the Ohio Constitution because of the Ohio Supreme Court's previous decision in *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992) (per curiam). Ultimately, under the Ohio Constitution, the Ohio Supreme Court held the following: "The court finds against the counterclaimants on their claim that the plan is unconstitutional and, accordingly, we find the plan to be constitutional." *Id.* at 1022. Nevertheless, careful examination of the per curiam opinion reveals that the court was specifically addressing the constitutionality of Senate district 32 under sections 4, 9, and 11 of Article XI of the Ohio Constitution. Thus, Plaintiffs in the instant case argued before this court that the Ohio Supreme Court did not rule on the constitutionality of the challenged house districts under sections 7 and 10 of Article XI of the Ohio Constitution and that this court, accordingly, was not precluded from addressing the issue. The Defendants, however, have argued that this court is precluded from addressing the constitutionality of the reapportionment plan under the Ohio Constitution because the Ohio Supreme Court specifically stated that "the plan" was constitutional, meaning the whole plan.

13. Based on our thorough review and consideration of all the evidence presented in this case, we find that race was the predominant motivating factor in the Defendants' creation of House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan because traditional districting principles were subordinated to or given less weight in the reapportionment process than racial considerations. These House districts are the result of racial gerrymandering. Although none of these districts presents a bizarre shape, both direct evidence from trial testimony and the Apportionment Board's Findings and Conclusions, and circumstantial evidence from Tilling's notes and the accompanying maps, clearly reveal that the Defendants intentionally crafed these eight districts with the predominant purpose of separating voters on the basis of race.

14. Because race was the predominant motivating factor in the drafting of these eight districts in the 1992 plan, they must be subjected to strict scrutiny analysis. *Miller*, 1995 WL 382020, at *13. Thus, the burden of production shifts to the Defendants to show that House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan were narrowly tailored to meet a compelling state interest. *See id; Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436.

15. The Defendants claim that compliance with section 2 of the Voting Rights Act was the compelling state interest that justified their ace-based [sic] redistricting. Defs.' Post Trial Br. at 57-63.

16. The Defendants agree that in order to show that section 2 of the Voting Rights Act was a compelling state interest, they must have a strong basis in evidence that race-based redistricting was necessary as a remedial measure to comply with the Voting Rights Act. *Id.* at 59-60. Moreover, the Defendants agree that a state has a "strong basis in evidence" to con-

clude that it needs to engage in race-based redistricting to comply with section 2 of the Voting Rights Act when the state has information that is reasonably sufficient to lead it to conclude that the relevant minority group could make out a prima facie section 2 challenge to the existing plan. *Id.* at 59, 60, 63.

17. As we noted earlier, a plaintiff can establish a prima facie case of a violation of section 2 of the Voting Rights Act by providing evidence that satisfies the three *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))).

18. Assuming without holding that the Defendants possessed information that would lead them to reasonably conclude that a plaintiff could satisfy the first two *Gingles* factors, we hold that the Defendants did not have a "strong basis in evidence" to engage in race-based redistricting in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan because they did not possess information that would reasonably lead them to conclude that a plaintiff could satisfy the third *Gingles* factor in these districts—the presence of racial bloc voting.

19. Both this court and the Supreme Court previously held on the basis of all the evidence, that racially polarized voting generally did not exist in Ohio's legislative elections. The Court noted the following:

> [A]ppellees [Plaintiffs in this case] have failed to demonstrate *Gingles*' third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The District Court specifically found that Ohio does not suffer from "racially polarized voting." 794 F. Supp. at 700-01. Accord, App. to Juris. Statement 132a-134a, and n.2, 139a-140a. Even appellees agree. *See* Tr. of Oral Arg. 25. Here, as in *Gingles*, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Gingles*, 478 U.S. at 49 n.15, 106 S. Ct. at 2766 n.15.

Quilter, 113 S. Ct. at 1158; *see also Quilter*, 1992 WL 677145, at *4 & n.2, n.3, *8 (holding that Ohio has coalitional voting, where whites cross over and vote for black candidates, and not polarized voting, where whites vote for white candidates and blacks vote for black candidates). By relying on these precedents, we are not saying that the Apportionment Board could not take race into account unless and until it had been proven in a court that a violation of section 2 of the Voting Rights Act had occurred. As we noted earlier, a state is not required to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277); *Miller*, 1995 WL 382020, at *13, *14.

Our point in noting the previous rulings of this court and the Supreme Court regarding the absence of polarized voting in Ohio was to emphasize that what was readily and reasonably apparent to and held by the courts, also should have been reasonably apparent to the Defendants—racially polarized voting generally does not exist in Ohio's legislative elections.[15]

20. The Defendants contend that Tilling reasonably concluded that "racial bloc voting existed throughout Ohio." Defs.' Post Trial Br. at 62 & n. 45. Yet, the bivariate regression analysis of the Plaintiffs' expert, Dr. Henderson, for the election years 1990, 1986, and 1984, revealed the presence of coalitional voting in each of the eight districts where the Defendants, through Tilling, chose to engage in race-based redistricting in the 1992 plan. *See Quilter*, 1992 WL 677145, at *4 & n.2. The percentage of white crossover vote in each of those districts was as follows: Rep. Mallory—50.66%; Rep. Rankin—50.93%; Rep. Miller—44.50%; Rep. Beatty—50.25%; Rep. McLin—35.44%; Rep. Roberts—45.98%; Rep. Sykes—48.76%; Rep. Jones—44.46%. *Id.* at *4 n.2. Prior to the time that the Defendants adopted "Amendment D," the 1992 plan, their own expert, Dr. King, analyzed over 200 elections throughout Ohio, and he concluded that a "degree of racially polarized viting existed in Ohio," but he was not willing to characterize the degree of racial polarization as "legally significant." Defs.' Post Trial Br. at 63 & n. 47. Regardless of Dr. King's ability to comment on the "legal" significance of his analyses, the

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[15] We note, however, one exception. In *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), the district court held that the two House districts, 52 and 53, under the 1981 redistricting plan, which were located in Mahoning County, violated section 2 of the Voting Rights Act. The court found under a totality of the circumstances analysis that racially polarized voting existed in these two distrists.

fact remains that Dr. King did not challenge Dr. Henderson's results on this point. *See Quilter*, 1992 WL 677145, at *4 n.3. Dr. King's own results regarding polarized voting in Ohio revealed that on average 95% of blacks voted for black candidates and 56.7% of whites voted for black candidates, thereby confirming Dr. Henderson's results. *Id.* at *4 n.2. In the Apportionment Board's Findings and Conclusions, the Board even admitted the presence of white cross-over voting in the minority districts where race-based remedial measures were utilized. Bd. Findings ¶ 168. Given the overwhelming statistical evidence of coalitional voting in the challenged districts under the existing plan, and given the fact that the Defendants had this information available to them before they adopted the 1992 plan, with its race-based remedial measures, we find that the Defendants could not reasonably conclude that the relevant minority group could establish a prima facie case of a violation of section 2 of the Voting Rights Act in the eight challenged districts. Significant evidence of white majority bloc voting in these Ohio legislative districts did not exist.

21. Because the Defendants did not possess a strong basis in evidence that they needed to engage in race-based redistricting to comply with section 2 of the Voting Rights, the Act does not provide a compelling state interest to justify the remedial action.[16] *See Miller*,

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[16] The dissent concludes that the "State of Ohio . . . has the compelling state interest of complying with the Voting Rights Act." Dissenting Op. at [18]. As support for this holding, the dissent relies on the district court's decision in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), where the court held that the two house ditsricts, 52 and 53, located in Mahoning county under the 1981 redistricting plan violated section 2 of the Voting Rights Act, the Fifteenth Amendment to the United States Constitution, and section 7(C) of Article XI of the Ohio Constitution. The dissent implies that our instant finding that section 2 of Voting Rights Act did not constitute a compelling state interest to jusify the Board's

1995 WL 382020, at *13 ("As we suggested in *Shaw*, compliance with federal antidiscrimination law cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."); *Hunt*, 861 F. Supp. at 440.

22. Because the Apportionment Board lacks a compelling state interest for its racial gerrymandering in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan,[17] we conclude that these districts violate

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racial gerrymandering in the eight challenged House districts, is somehow inconsistent with the court's decision in *Armour*. In actuality, the two decisions present no conflict. The finding of racially polarized voting and a Voting Rights Act violation in one county of Ohio, does not necessarily mean that such evidence will be found in every county of Ohio. The House districts in Mahoning County under the 1992 plan were not even challenged in the instant case. To engage in race-based redistricting so as to remedy potential violations of section 2 of the Voting Rights Act, the Board must analyze the voting patterns in each district under the previous plan to determine if prima facie evidence of a section 2 violation exists. If such evidence does not exist in a given district, then the Board cannot engage in race-based redistricting in that district simply because a Voting Rights Act violation previously was found in another district in a different part of the State.

[17] In dissent, our colleague concludes that the Apportionment Board did have another compelling interest that justified its racial gerrymandering: compliance with Article XI of the Ohio Constitution, which contains Ohio's mandate to utilize traditional districting principles in the redistricting process. Dissenting Op. at [18]. Obviously, such a conclusion is based on the presumption that the Board adhered to the traditional districting principles in the Ohio Constitution when it drafted the 1992 plan. Although the dissent finds that the Board did comply with the districting principles in the Ohio Constitution, as we noted earlier the latter conclusion is a hotly contested matter, *see* Pls.' Post-Hr'g Br. at 36-49, on which we have previously chosen to abstain, *see Quilter*, 794 F. Supp. at 702. Because the Defendants, themselves, did not chose [sic] to proffer such a compelling justification for their racial gerrymandering, we again find it unnecessary to address the specific issue whether the Board complied with the traditional districting princi-

the Equal Protection Clause of the Fourteenth Amendment. Based on our holding, we find it un-

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ples in the Ohio Constitution when it drafted the 1992 plan. Nevertheless, we offer two observations regarding the broader issue whether, assuming without holding that the Board did comply with the Ohio Constitution, such compliance could serve as a compelling state interest that would justify the Board's racial gerrymandering in the 1992 plan.

First, no previous court has held that a state's interest in complying with its own constitution provides a *compelling* justification to engage in racial gerrymandering. The dissent cites case law, which holds that states do have a legitimate interest in complying with the traditional districting principles embodied in their state constitutions. Dissenting Op. at [18]. No court, however, has ever held in the context of an equal protection challenge and in the face of direct evidence of racial gerrymandering that a state's interest in complying with its traditional districting principles provided compelling justification to engage in racial gerrymandering. Even the Defendants, themselves, do not make such a claim. To be sure, the Defendants argued that the Apportionment Board's compliance with Article XI of the Ohio Constitution indicated that it did not engage in racial gerrymandering and that strict scrutiny accordingly was not required. *See* Defs.' Trial Br. at 6-14, 61-64; Defs.' Post Trial Br. at 45-56. Nevertheless, even the Defendants realized that if this court determined that strict scrutiny was triggered by evidence of racial gerrymandering, the Defendants' only viable compelling interest sufficient to justify such race-based redistricting would be the Board's interest in complying with the mandates of section 2 of the Voting Rights Act. Thus, the Defendants relied solely on the Voting Rights Act as compelling justification for their race-base redistricting, once such a condition was determined, and did not even proffer compliance with the Ohio Constitution as a compelling justification. *See* Defs.' Post Trial Br. at 56-63.

Second, the dissent's conclusion defies logical reasoning. Without reiterating the Fourteenth Amendment's aversion toward race-base [sic] classifications, suffice it to say that our earlier analysis of Supreme Court precedent revealed that a state's purposeful use of race can only survive strict scrutiny if it is remedial in nature and substantially supported by evidence of past racial discrimination. *See Reno*, 113 S. Ct. at 2831 (citing *Crosson*, 488 U.S. at 491-93; *Wygant*, 476 U.S. at 280-82). For example, in the context of our discussion of the Voting Rights Act as a compelling state interest,

necessary to discuss whether the 1992 plan was narrowly tailored to further a compelling state interest.

IV. Conclusion

The Fourteenth and Fifteenth Amendments to the United States Constitution, and the Voting Rights Act of 1965 have been major vehicles for the empowerment of black Americans long denied the full enjoyment of their political rights. Over the years, various schemes and artifices have been designed to serve as impediments to the attainment of citizenship status by minorities. As Justice Frankfurter, however, wrote for the Supreme Court in *Lane v. Wilson*, 307 U.S. 268, 275 (1939), "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Without characterizing the nature of the discrimination present here, we simply hold that Justice Frankfurter's admonition is equally applicable to the Equal Protection Clause of the Fourteenth Amendment. Using race as the predominant factor to draw lines to concentrate black voters in discrete legislative districts with the reciprocal effect of siphoning off and reducing their influence in other districts, without

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we noted that compliance with Voting Rights Act could serve as a compelling justification to engage in race-based redistricting so long as substantial evidence was present to indicate the need for such remedial action. *See supra* part II.D. Compliance with the Voting Rights Act, which was promulgated as a remedial measure for racial discrimination in the voting context, will clearly require that the apportioning entity purposefully consider race. Obviously, compliance with the traditional districting principles in the Ohio Constitution does not qualify as such a compelling interest. The Apportionment Board did not have to purposefully consider race so as to remedy past racial discrimination in order to comply with the traditional districting principles in the Ohio Constitution. The traditional districting principles in Article XI were clearly designed with the purpose of eliminating all forms of bias from the redistricting process. *See* Ohio Const. art. XI. Thus, to conclude that the Board's interest in complying with these principles justified their racial gerrymandering is logically unsustainable.

legally cognizable justification, is incompatible with the Constitution, as now interpreted by the Supreme Court. Accordingly, we direct the State Defendants to redraft House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan to comply with the aforementioned principles.

In placing reliance on this court's and the Supreme Court's holdings that racial bloc voting generally had not occurred in Ohio's legislative elections, we make no judgment as to the state of racial progress in other aspects of race relations in Ohio. The fact that black voters, however, in the various legislative districts, as shown by the record in this case, coalesce with white voters in significant enough numbers to elect candidates of their choice, who happened to be black, demonstrates a high degree of maturity. In our view, this degree of voter maturity represents the essence and ultimate objective of the Voting Rights Act and the Constitution.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze, Sr.
ANTHONY J. CELEBREZZE, SR.
U.S. Circuit Judge

SUPPLEMENTAL DISSENTING OPINION

Dowd, J., dissenting.

On May 26, 1995, my colleagues vacated the majority opinion dated April 28, 1995 (Docket No. 322) and replaced it with a new majority opinion (Docket No. 327). In April, I had dissented (Docket No. 323). In May, I chose not to modify my original dissent, filing nothing in response to the "new" majority opinion which essentially added only comments on my dissent.

Now my colleagues have once again vacated their majority opinion and replaced it with an opinion that substantially changes the May 26, 1995 opinion, particularly by their deletion of the discussion relating to the "trigger" for strict scrutiny (i.e., the progeny of *Shaw v. Reno*, —— U.S. ——, 113 S.Ct. 2816 (1993)), and their insertion of a discussion of the recently decided *Miller v. Johnson*, —— U.S. ——, 115 S.Ct. 2475, 63 USLW 4726 (1995).[1]

At this juncture, I remain steadfast in my decision not to vacate my dissent of April 28, 1995, notwithstanding the fact that, given all the tinkering with the majority opinion, the dissent is no longer a very good "fit" for the majority opinion. One major reason for my decision not to vacate is that the dissent has already been submitted for review before the Supreme Court of the United States, as is evidenced by its placement in the Appendix to the Jurisdictonal Statement filed with that Court.[2] What I said, I said. For the most part, as I did in May, I now feel no real compulsion to "correct" my dissent in light of the subsequent majority opinion which commented on

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[1] *Miller v. Johnson* is also found on the WESTLAW electronic database at 1995 WL 382020. The majority opinion cites to this database. For consistency, this supplementary dissent will hereafter do the same.

[2] Both majority opinions have also been submitted as part of the jurisdictional statement.

it or in light of the latest majority opinion. Astute readers will accord my dissent whatever value it has and interpret it in light of the subsequent procedural (and substantive) posture of this case and developments in case law. I do, however, wish to set forth my view of the application of *Miller v. Johnson* to this case.[3]

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[3] I also believe it is necessary to comment regarding the majority opinion's assessment of my prior discussion of the application of the Local Rules of the U.S. District Court for the Northern District of Ohio. I do so because of the importance of the latter issue to this District Court and its potential impact as this case is reviewed by the Supreme Court. Until very recently, I was the longtime Chairman of this District Court's Rules Committee. Therefore, admittedly I am in a better position than my two colleagues to know, appreciate and apply the Local Rules of this District Court. Accordingly, I make this clarifying comment.

I have always opposed the majority's decision to grant plaintiffs leave to amend their complaint *after remand* to add an Equal Protection claim under *Shaw v. Reno*. In my dissent of April 28, 1995, I articulated my reasons, one of which was rooted in certain of the Local Rules of the U.S. District Court for the Northern District of Ohio. The majority, in both its May 26, 1995 opinion and the latest opinion, asserted that the Local Rules I cited have no application. This is not so.

The majority undoubtedly recognizes that, under 28 U.S.C. § 2284, this panel sits as a district court. Therefore, the Local Rules of the Northern District of Ohio apply, despite the fact that two of the panel judges are circuit court judges.

Prior to January 1, 1992, this District Court's Local Rules provided that a subsequently-filed civil case would be deemed related to a previously-filed civil case which "involve[d] the same issue or issues of fact or grows out of the same transaction or subject matter as a pending civil suit[.]" *See* Former Local Rule 7.09(4)(c). In such circumstances that local rule *required* that the later-filed case be assigned to the judge presiding over the earlier case so long as the earlier case was still pending.

The Judges of this District Court, acting under the authority of Fed. R. Civ. P. 83, determined over time that this "related case" rule was being used by litigants and attorneys to "judge shop." Therefore, the related case rule was abolished and replaced with the present local rule pursuant to which, even if a new case appears related to an existing case on another judge's docket, it cannot be

APPLICATION OF *MILLER V. JOHNSON*

In my April 28, 1995 dissent, I took the threshold position that the plaintiffs' *Shaw v. Reno* claim had no merit because the districts in question in this lawsuit, are not bizarrely shaped. *Miller v. Johnson*, however, has now made clear that "a threshold showing of bizarreness" is not required. 1995 WL 382020, at *9. To that extent, I must retract those portions of my dissent which discussed

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shifted to the docket of the judge who drew the first case absent the consent of both judges. *See* Local Rules 1:2.4(2) and 6:2.5(c). Moreover, one judge cannot transfer an unrelated case on his or her docket to another judge without the approval of the Chief Judge of the District Court. *See* Local Rule 6:2.4. I first cited these local rules as part of the basis for my opposition to a post-remand amendment of the complaint.

The circuit judges making up the majority of this panel have stated in a footnote to their opinion that the rules do not apply in this instance because the plaintiffs did not file a *new lawsuit* alleging a *Shaw v. Reno* claim. The majority has missed the point. If the plaintiffs had, as they *should* have, filed a new lawsuit to assert their post-remand claim, the cited Local Rules of this District (presuming, of course, that the new case was filed in this district, as it could also have properly been filed in the Southern District of Ohio), would have operated to *prevent* them from placing their claim before this three-judge panel, a panel which they already knew was, in the majority, favorable to their viewpoint. Therefore, under the Local Rules of this District Court, the only way that the plaintiffs could assure a sympathetic ear was to obtain leave to amend the complaint.

The majority asserts that, while it may not have authority to "consider on remand the issues that the Supreme Court decided," it may "consider issues that have not been decided." There is a world of difference between considering issues that have not been previously *decided* and issues that have not been previously *raised*. The entire point is that, once a case has gone on appeal and back, if the plaintiffs have *new* claims against the defendants, they must file a new lawsuit. Failure to do so stretches Fed. R. Civ. P. 15, the remand rule, and the local rules of this District Court so far beyond their meanings as to completely destroy them. This is the ultimate in judge-shopping, the very abuse sought to be avoided by this District Court's Local Rules.

what I then thought was the threshold showing required for a *Shaw v. Reno* claim.

As noted by the majority, *Miller v. Johnson* clarified the burden of proof necessary to trigger strict scrutiny:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was *the predominant factor* motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature *subordinated traditional race-neutral districting principles*, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, *to racial considerations.* Where these or other race-neutral considerations are the basis for redistricting legislation and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."

1995 WL 382020, at *10 (citations omitted and emphases added).

Despite the clarity of this expression, the majority concludes that "there remains some ambiguity regarding the *Miller* 'predominant factor' test." The specific ambiguity relates to the meaning of the word "subordinated" in the test. The majority opines that "subordinated" could mean that, as compared to racial considerations, the legislature "disregarded or abandoned" traditional districting principles or that it merely "accorded [them] less emphasis or less weight[.]" The majority concludes that both interpretations are correct.

I do not disagree with the majority's ultimate conclusion that proof of either disregard and/or abandonment of traditional districting principles in favor of racial considera-

tions *or* proof of diminished emphasis on traditional districting principles in favor of racial considerations is sufficient to establish a plaintiff's claim that race was the predominant factor upon which a given redistricting was based. I would only quarrel with the characterization of "the predominent factor test" as ambiguous. "Subordination" has a clear meaning: something is subordinated when it is placed in a lower order or class, or considered as having less value or importance. This, however, is only a minor point of divergence between my view and the majority's.

I find that the defendants adhered to traditional districting principles, which happen to be also contained in the Ohio Constitution, in drawing the legislative districts in question *and* that they did not subordinate these principles to racial considerations. I would so hold notwithstanding the fact that, as I recognized in my dissent of April 28, 1995 at footnote 9, James R. Tilling's notes suggest that he purposefully considered race when drawing the districts. One can purposefully consider something without automatically subordinating all other factors also under consideration.[4] I find that the defendants considered race as they considered other factors, such as the districting principles set forth in the Ohio Constitution. Therefore, I would conclude that strict scrutiny is not required,

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[4] In my April 28 dissent, I declined addressing at length the majority's discussion of the "trigger" for strict scrutiny, a discussion which has been deleted in the latest majority opinion in favor of the *Miller v. Johnson* discussion. On April 28, I simply presumed, because of (1) the references to race in Tilling's notes, (2) the importance of the rights at stake, and (3) the ambiguity regarding the appropriate "trigger," that strict scrutiny should apply. Now that the Supreme Court has clarified that the "trigger" is "race-the-premoninant-factor," I want to clearly state that I would not find Tilling's notes sufficient to prove that race was *the predominant* factor considered. My present position is not inconsistent with my April 28 dissent because there I simply took the view for the sake of discussion "that caution requires strict scrutiny." (April 28, 1995 Dissent, at 17). Following *Miller*, the test is clear and the need for caution on this matter is gone.

a conclusion which would virtually end the analysis in my view.[5]

Even if strict scrutiny were required, I find for the reasons previously set forth in my April 28, 1995 dissent that the defendants had a compelling state interest. I will not repeat my analysis on this point. Suffice to say that, in my view, the defendants respected traditional districting principles while also giving race the consideration it was due in light of the Voting Rights Act and *Armour v. State of Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991). Balancing *all* of these considerations led to a redistricting plan narrowly tailored to meet a compelling state interest, thus withstanding strict scrutiny.

The redistricting plan that is the subject of this lawsuit involves a legislature with 99 House Districts which must be configured in compliance with the Ohio Constitution. Of these 99, only eight have been challenged here. These eight discrete districts take in counties which are entitled to more than one legislator each, a fact which required the Apportionment Board to make decisions as to how to split the counties. Given the several constraints placed on the Apportionment Board, i.e., the Voting Rights Act, the Fourteenth Amendment, *Armour v. State of Ohio*, in addition to the Ohio Constitution, this Court must take to heart the admonition of the *Miller* Court that:

> [t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise *extraordi-*

[5] If strict scrutiny is not the standard of review, then rational basis applies. It would be extremely difficult, if not impossible, to conclude that the defendants had no rational basis for the district lines they drew.

> *nary caution* in adjudicating claims that a state has drawn district lines on the basis of race.

Miller v. Johnson, 1995 WL 382020, at *10 (emphasis added). In my view, the majority has failed to exercise the requisite caution.

CONCLUSION

For the reasons expressed in my April 28, 1995 dissent, as supplemented and modified herein, I respectfuly dissent.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX C

[Filed May 26, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

JUDGE NATHANIEL R. JONES
JUDGE ANTHONY J. CELEBREZZE, SR.
JUDGE DAVID D. DOWD, JR.

OPINION

The question before this court is whether the Ohio Apportionment Board's consideration of race in its 1992 redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment. We hold that by virtue of demonstrated white and African American coalitional voting for legislative seats in Ohio, and the failure of Defendants to demonstrate a compelling state interest in using race in drawing legislative lines, certain districts in the 1992 plan are unconstitutional.

I. Background and Procedural History

Pursuant to the Ohio Constitution, the State Apportionment Board, comprised of five members, must reapportion State House and Senate electoral districts for the state legislature every ten years.[1] Following the 1990 federal census, a majority of the Apportionment Board[2] appointed James R. Tilling to draft an apportionment plan on behalf of the Board. After conducting public hearings throughout the state, including meeting with some members of minority organizations, Tilling drafted a plan that included eight majority-minority districts, districts in which a majority of the population is a member of a specific minority group. *Voinovich v. Quilter,* 113 S. Ct. 1149, 1153 (1993). On October 1, 1991, the Apportionment Board adopted the plan Tilling submitted by a

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[1] Article XI, Section I of the Constitution of the State of Ohio provides:

> The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.
>
> Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year [1971] and every tenth year thereafter.

Ohio Const., art. XI, § 1.

[2] The majority consisted of Defendants George V. Voinovich, Governor of the State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and Robert A. Taft, II, Secretary of State of Ohio. In the minority were Plaintiffs Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, and Thomas E. Ferguson, Auditor of the State of Ohio.

3-2 vote along party lines. *Id.* The three Republican members voted for the plan, and the two Democrats voted against it. The Board later reconvened on October 3, 1991, to make several technical amendments to the plan, and the plan, adopted on October 3, 1991, in the wake of these changes, was designated "Amendment C."

On November 1, 1991, Barney Quilter and Thomas Ferguson, the two Democrats on the Board who voted against the plan, and various Democratic party officials and legislators filed suit against the Republican members of the Apportionment Board and Tilling.[3] Seeking invalidation of the plan, the Plaintiffs alleged that the redistricting plan violated section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution, which provided specific apportionment guidelines. *Voinovich v. Quilter*, 794 F. Supp. 695, 695-96 (N.D. Ohio 1992). According to the Plaintiffs, the Defendants intionally "packed minorities into certain districts where minorities historically were able to elect representatives of choice with crossover votes." *Id.* at 698. The Plaintiffs contended that this packing resulted in a waste of minority votes in the packed districts and a dilution of minority voting strength in the surrounding areas where the "packed" voters could influence elections. *Id.* In response, the Defendants contended that the plan actually

[3] The dissent claims that the Plaintiffs commenced this litigation "to wrest control of Ohio's reapportionment process from the majority of the Board and place it with the federal court system." Dissenting Op. at [2]. Obviously, such a charge could be leveled against any entity that chooses to challenge a state's infringement of its federal statutory or constitutional rights because it is one of the means to bring such a challenge. Nevertheless, this was not the end or purpose for which the Plaintiffs filed their claim. The Plaintiffs sought a reapportionment plan that was not racially discriminatory, and in filing suit with the federal court, they were simply utilizing the best means to accomplish that end.

enhanced the strength of black voters by creating safe, minority-dominated districts. As justification for these changes, the Defendants cited compliance with the Voting Rights Act and federal case law, which allegedly mandated the drawing of majority-minority districts. *Id.*

On January 31, 1992, a majority of this three judge panel held that there was "no legal mandate or finding of a Voting Rights Act violation to justify Defendants' creation of majority-minority districts wherever possible in the 1991 apportionment plan." *Id.* at 701. Thus, we ordered the Board to draft a new plan or demonstrate that it was remedying a section 2 violation.[4] *Id.* at 702.

The Apportionment Board responded by establishing and adopting a record on February 18, 1992, that, in its view, justified the Board's creation of minority-controlled state legislative districts. Furthermore at its February 18 meeting, the Board amended the 1991 plan to eliminate a series of technical errors in the plan that the Ohio Supreme Court had identified in its separate review of the plan, *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992). The resulting 1992 plan, "Amendment D," created only five majority-minority districts, however, a reduction from the eight majority-minority districts in the 1991 plan, "Amendment C."

On March 10, 1992, after the Board submitted its findings and conclusions, along with the new 1992 plan, this court held that the Board "fail[ed] once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the

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[4] We declined to address the Plaintiffs' constitutional claims at this point because our analysis under the Voting Rights Act required the plan to be justified or revised. Likewise, because the Ohio Supreme Court, in *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992), was concurrently considering the Plaintiffs' claim under the Ohio Constitution, we abstained from addressing the pendant claim.

Voting Rights Act of 1965." *Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992). Furthermore, this court held that the 1992 plan also violated the Fifteenth Amendment of the United States Constitution. *Id.* Nine days later, in response to Defendants' motion for a stay of the March 10 order pending appeal to the United States Supreme Court, this court additionally held that both the 1991 and 1992 plans violated the Fourteenth Amendment because they departed from the requirement that all districts be of nearly equal population. *Quilter v. Voinovich*, No. 5:91CV-2219, 1992 WL 677145, at *10 (N.D. Ohio Mar. 19, 1992).

The Defendants appealed to the United States Supreme Court. In *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), the Supreme Court reversed this court's *Quilter* decisions. Denying two of the Plaintiffs' claims, the Court held that the reapportionment plan at issue did not violate section 2 of the Voting Rights Act, nor did it violate the Fifteenth Amendment to the United States Constitution. Nevertheless, the Court held that the Plaintiffs had established a *prima facie* case that the population deviations between the districts violated the Equal Protection Clause, and the Court remanded "only for further proceedings on whether the plan's deviation from equal population among districts violate[d] the Fourteenth Amendment." *Id.* at 1154.

Upon remand, we held that the Ohio reapportionment plan survived scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause because (1) the Defendants advanced a genuine, rational state policy to justify the deviations from population equality among the state legislative districts, (2) their plan reasonably furthered the rational state policy, and (3) the 13.81% and 10.54% total deviations fell within constitutional limits. *Quilter v. Voinovich*, 857 F. Supp. 579, 587 (N.D. Ohio 1994). Accordingly, judgment was entered for the Defendants on this issue.

While the latter decision was pending, however, the Plaintiffs moved this court for permission to amend their complaint in light of the Supreme Court's recent decision in *Shaw v. Reno*, 113 S. Ct. 2816 (1993).[5] As a lower court, we are bound of course, regardless of the strength of our reservations,[6] to follow the Supreme Court's decision in *Reno*, where the Court held for the first time that a plaintiff could state a claim under the Equal Protection Clause by alleging that a districting plan, "though race-neutral on its face, rationally canot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 2828. We granted the Plaintiffs' motion,[7] and their complaint was accord-

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[5] In dissent, our colleague argues that the Plaintiffs were actually bringing another vote dilution claim rather than a *Shaw v. Reno* claim. Dissenting Op. at [16]. Actually, however, this case is simply a classic example that the same set of facts or circumstances may give rise to more than one cause of action. The Supreme Court clearly denied the Plaintiffs' vote dilution claim under section 2 of the Voting Rights Act, but the Court did not address whether the Apportionment Board's use of race in redistricting, ostensibly as a remedial measure pursuant to the Voting Rights Act, violated the Equal Protection Clause of the Fourteenth Amendment. *See Quilter*, 113 S. Ct. at 1157. The Plaintiffs have brought the latter challenge in the instant case.

[6] We note that critics of the Court's decision in *Shaw* have raised compelling concerns with which we sympathize. *See* A. Leon Higginbotham, Jr., et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Review 1593 (1994); Brief of the Congressional Black Caucus as *Amicus Curiae* in Support of Appellants, *United States v. Hays*, Nos. 94-558/627 (U.S., *cert. granted* Dec. 12, 1995).

[7] In dissent, our colleague renews his disagreement with our prior decision to allow the Plaintiffs to amend their Complaint and bring a *Shaw v. Reno* challenge to the reapportionment plan. Dissenting Op. at [4-5]. The dissent alleges that our decision violated the mandate rule by exceeding the scope of the remand, and he claims that review of a *Shaw* claim actually "required a

ingly amended.[8] *Quilter v. Voinovich*, 157 F.R.D. 36, 40 (N.D. Ohio 1994).

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new lawsuit and a new draw, with a probable different three-judge panel." *Id.*

In our prior decision, we clarified that "while a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Quilter v. Voinovich*, 157 F.R.D. 36, 38-39 (N.D. Ohio 1994) (quoting *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (quotation omitted)). Under the mandate rule, we may not consider on remand the issues that the Supreme Court decided, but we may consider issues that have not been decided. *See id.* at 39 (citing *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.), *cert. denied*, 113 S. Ct. 125 (1992); *see id.* at 39 n.1 (citing cases from other circuits holding the same). In this case, the Supreme Court expressly abstained from considering the type of Equal Protection Clause challenge delineated in *Shaw*. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1157 (1993). Thus, the Court's mandate did not prohibit us from considering the issue on remand.

To support the contention that the Plaintiffs' *Shaw* claim required a new lawsuit, new draw, etc., the dissent cites to some Local Rules that give direction with respect to the appropriate disposition of related cases that are filed separately. *See* Dissenting Op. at [5 n.2]. Yet, these Local Rules would only apply if Plaintiffs had filed a new lawsuit alleging a *Shaw* claim. As such these Local Rules do not support the proposition that the Plaintiffs were "required to file a new lawsuit." Indeed, the dissent offers no supporting authority for this proposition, other than the case law cited in conjunction with the previous argument.

[8] The Plaintiffs' Second Amended Complaint revised the First Amended Complaint in only two respects. First, Count IV, entitled "Violation of the Equal Protection Clause—Segregation of Voters by Race Without Compelling Governmental Justification," is added. Second, the prayer for relief was accordingly revised. In pertinent part, Count IV alleges the following:

> 52. . . . The reapportionment plan adopted by the Defendants on February 18, 1992 intentionally separated Ohio voters on the basis of race without regard for the traditional redistricting principles set forth in the Ohio Constitution and otherwise without any compelling governmental justification. To justify the creation of race-based districts in the urban centers of Ohio, Defendants asserted that there was widespread racial bloc voting throughout Ohio. The trial court specifically found, and the Supreme Court of the United States

Having considered the record evidence and the arguments of the parties, both written and oral, we are prepared to issue our decision.[9] We preface our findings of

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confirmed, that Ohio did not suffer from legally cognizable racially polarized voting. . . .

53. The Defendants deliberately created race-based legislative districts in urban centers initially and then used the purported, but sham, necessity of creating such districts as the basis for ignoring the traditional anti-gerrymandering provisions of the Ohio Constitution throughout the state of Ohio. Absent the ripple effect of the racial gerrymandering in the urban centers of the state of Ohio, the Defendants would not have been forced to ignore on a wholesale basis the directives of Article XI, Section 7, of the Ohio Constitution to follow existing political and legislative boundaries wherever possible.

54. . . . The decision to abandon the traditional districting mandates contained within the Ohio Constitution is neither compelled by the doctrine of federal supremacy, nor based on any lawful, organized, or rational districting criteria. . . .

55. The Defendants have articulated no compelling governmental interest for the wholesale abandonment of the provisions of the Ohio Constitution. As a result, the Defendants have drawn irregular districts in numerous places throughout the state, districts which have no explanation other than the ripple effects caused by the racially drawn districts in the urban centers. In some instances, the racially drawn districts themselves have irregular shapes not required by the Ohio Constitution.

56. The districts which have been modified solely on the basis of race include House Districts 31, 30, 22, 21, 38, 39, 44, and 49. No evidence has been presented to the trial court that either legally cognizable remedial action was necessary to draw these racially gerrymandered districts, or that the creation of such districts was narrowly tailored to further any compelling government need.

Pls' Second Am. Compl. ¶¶ 52-56.

[9] The court also appreciated and considered an *amicus* brief submitted by the United States Department of Justice, which supported the position of the Defendants.

fact and conclusions of law, however, with a discussion of the governing law that provides the analytical paradigm for our conclusions.

II. First Principles

A. *Nature of a Shaw v. Reno Claim*

Prior to the Supreme Court's decision in *Reno*, the Court had delineated only two legal theories to support a redistricting challenge under the Equal Protection Clause of the Fourteenth Amendment: (1) violation of the "one-person-one-vote" principle, which requires that districts be equal in population so that the votes cast by voters in one district do not have less weight than those cast by voters in other districts, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); and (2) a claim of vote dilution, whereby districts are purposefully drawn to unfairly dilute or diminish the voting strength of an identified group of voters, *Rodgers v. Lodge*, 458 U.S. 613 (1982). *Shaw v. Hunt*, 861 F. Supp. 408, 421 (E.D.N.C. 1994), *petition for cert. filed*, 63 U.S.L.W. 3439 (U.S. Nov. 21, 1994) (No. 94-923); *see also Reno*, 113 S. Ct. at 2822, 2823, 2828. Under both theories, the Court found that redistricting schemes violated the Equal Protection Clause of the Fourteenth Amendment only when they caused *material harm* to the voting strength of an identifiable group of citizens. *Hunt*, 861 F. Supp. at 422; *see, e.g., Rodgers v. Lodge*, 458 U.S. 613, 616-17 (1982) (noting that redistricting plan violates Fourteenth Amendment when it is adopted with a discriminatory *purpose* and has *effect* of diluting minority voting strength). The Supreme Court had never held that a plaintiff could challenge a redistricting plan solely because it impermissibly took race into account in drawing district lines; the Court had required not only a showing of discriminatory purpose but also specific discriminatory effect, a concrete material harm, to state a valid claim under the Fourteenth Amendment.

In *Shaw v. Reno*, however, the Court announced a third means to challenge legislative redistricting under the Equal Protection Clause. The Court held that "a plaintiff challenging reapportionment [plan] under the Equal Protection Clause may state a claim by alleging that the [plan], though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 113 S. Ct. at 2828. In essence, the Court was saying that a plaintiff no longer had to allege discriminatory effect or material harm in conjunction with discriminatory purpose to state a valid equal protection claim, if the redistricting plan contained districts, whose composition rationally could be understood only as a deliberate effort to segregate voters on the basis of race—a racial gerrymander, *id.* at 2823 (defining a racial gerrymander as the deliberate and arbitrary distortion of district boundaries for racial purposes).[10]

The Court declared that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Id.* at 2824 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), and they "may serve to stimulate our society's latent race-consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth

[10] The dissent does not find the Supreme Court's definition of racial gerrymandering "particularly enlightening in view of the apparent conflict of meaning between 'deliberate' and 'arbitrary' actions." Dissenting Op. at [17]. Evidently, the dissent has never recognized that someone deliberately can act in an arbitrary manner.

or needs," *United Jewish Organizations v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part).

Because a racial gerrymander is just as invidious as any other law that classifies people on the basis of their race, the Court in *Reno* held that race-based redistricting demands the same level of scrutiny, that is, strict scrutiny: a race-based redistricting plan can be upheld only if it is narrowly tailored to further a compelling state interest. 113 S. Ct. at 2825, 2826, 2830; *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (noting that strict scrutiny applies not only to legislation that contains explicit racial classifications but also to those "rare" statutes that are "unexplainable on grounds other than race," even though they are race-neutral on their face). Consistent with prior practice, the Court made clear that because a racial gerrymander is a racial classification, it must be reviewed with strict scrutiny even if the drafters of the redistricting plan claim that the plan was drawn with the "benign" purpose of enhancing minority voting strength, 113 S. Ct. at 2830 ("Equal Protection Clause demands strict scrutiny of all racial classifications . . . because without it, a court cannot determine whether or not the discrimination truly is "benign."); *id.* at 2826 ("[D]istrict lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption."), or claim that the racial gerrymander benefits or burdens the races equally, *id.* at 2829 (citing *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 1370 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.").

We believe that the Court's decision in *Reno* to apply strict scrutiny to a race-based apportionment plan is congruous with the Court's Equal Protection Clause analysis

in other contexts where the use of racial classifications has been justified as a remedial measure or affirmative action. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (government contracting and minority set-asides); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (public employment); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (admission to public medical school). As such, *Reno* is applicable to this case because the evidence reveals that the Defendants drew certain districts in the 1992 plan to enhance the voting strength of minority voters, ostensibly with remedial purposes in mind. *See* discussion *infra* part III; *see also* Defs.' Post Trial Br. at 60 (stating that if this court finds strict scrutiny should be applied to the 1992 plan, the Apportionment Board had enough evidence to conclude that *remedial* action was necessary to comply with section 2 of the Voting Rights Act).

Although the Court in *Reno* clearly created a new means to challenge state apportionment plans pursuant to the Fourteenth Amendment, its analysis left many unanswered questions that are integral to the proper resolution of a *Shaw v. Reno* claim: (1) To what extent must "race" be a factor in an apportionment plan before the plan becomes a racial gerrymander subject strict scrutiny analysis?; (2) Is circumstantial evidence of "bizarre" district shapes necessary to state and sustain a *Shaw v. Reno* claim?; (3) Once strict scrutiny is triggered, who has the burden of proof in a *Reno* claim?; (4) What constitutes a "compelling state interest" that would justify race-based redistricting?; and (5) What is the meaning of "narrowly tailored" in the redistricting context? We turn now to consider these issues.

B. *The Trigger for Strict Scrutiny*

The Court in *Reno* did not specify the threshold showing of racial consideration that was necessary to establish that a redistricting plan was a racial gerrymander, subject

to strict scrutiny. The Court did, however, narrow the spectrum by significantly reiterating the principle that "awareness" of race or "race consciousness" in the districting process is not equivalent to a racial gerrymander that requires strict scrutiny analysis:

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

113 S. Ct. at 2826 (emphasis in original). This proposition is not novel, however, because the Court's equal protection cases "have long recognized that there is a critical distinction between 'race-conscious' action and 'race-based' action, and that the 'intentional' use of race required to trigger strict scrutiny of legislative action cannot be established simply by showing that the legislature adopted a particular course of action with knowledge that it was likely to have a particular racial impact. *Hunt*, 861 F. Supp. at 433 (citing *Personnel Adm. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (noting that the sort of "discriminatory purpose" required to trigger strict scrutiny of a statute that is facially race-neutral "implies more than intent as volition or intent as awareness of consequences"; it necessitates evidence revealing "that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its . . . effects upon an identifiable group")). Thus, in the redistricting context, the level of racial consideration or racial intent that is necessary to trigger strict scrutiny under *Reno* is more than "just taking action with the knowledge or awareness that it is likely to have a particular racial impact, but taking it with the *specific intent* to bring about such an impact." *Id.; Reno*, 113 S. Ct. at 2823 (noting that a racial gerrymander is "the

deliberate and arbitrary distortion of district boundaries . . . for [*racial*] *purposes*") (emphasis added)).

Because we believe that the Supreme Court in *Reno* "intended to place race-based redistricting legislation into the same category as all other forms of race-based state action after *Croson*, for purposes of analysis under the Equal Protection Clause," *Hunt*, 861 F. Supp. at 429, we find that strict scrutiny of a redistricting plan is now triggered if "racial considerations played a 'substantial' or 'motivating' role in the line drawing process, even if they were not the only factor that influenced that process," *id.* at 431, and even if the state's use of race "can be said to have a 'benign' or 'remedial' purpose," *id.* at 431. *See Hays v. Louisiana*, 839 F. Supp. 1188, 1202, 1214, 1216 (W.D. La. 1993) (*"Hays I"*) (majority and concurring opinion), *vacated and remanded for reconsideration due to change in law*, 114 S.Ct. 2731 (1994), *on remand, Hays v. Louisiana*, 862 F. Supp. 119 (W.D. La. 1994) (*"Hays II"*), *cert. granted sub nom., United States v. Hays*, 115 S. Ct. 687 (1994); *see also Arlington Heights*, 429 U.S. at 265-66 ("When there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified."). The *Hunt* court described the level of racial consideration necessary to trigger strict scrutiny as follows:

> This "race-a-motivating-factor" triggering test is necessarily met by proof that the plan's lines were deliberately drawn so as to create one or more districts in which a particular racial group is a majority, even if factors other than race are shown to have played a significant role in the precise location and shape of those districts. If the line drawing process is shown to have been infected by such a deliberate racial purpose, strict scrutiny cannot be avoided simply by demonstrating that the shape and location of the districts can rationally be explained by reference to

> some districting principle other than race, for the intentional classification of voters by race, though perhaps disguised, is still likely to reflect the "impermissible racial stereotypes," *Shaw*, —— U.S. at ——, 113 S. Ct. at 2827, " 'illegitimate notions of racial inferiority' " and " 'simple racial politics,' " *id.* at ——, 113 S. Ct. at 2824, that strict scrutiny is designed to " 'smoke out.' " *Croson*, 488 U.S. at 493.

Hunt, 861 F. Supp. at 431-32.

This understanding of the level of racial intent needed to trigger strict scrutiny analysis in the redistricting context is the obvious implication of the *Reno* Court's adoption of the equal protection principles delineated in *Croson*, *Wygant*, and *Arlington Heights*, *see Reno*, 113 S. Ct. at 2824, 2825, 2829, 2830, 2831, 2832, and it is consistent with them. *Hunt*, 861 F. Supp. at 432 & n.19; *see also* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 Mich. L. Rev. 588, 643-49 (1993) (discussing *Reno* Court's importation of *Croson's* equal protection analysis, which "now serves as the paradigmatic case for equal protection analysis," to the redistricting context).

Before leaving this issue, we note that some courts that have addressed this question since the advent of *Reno*, have reached different conclusions regarding the level of racial consideration that is necessary to trigger strict scrutiny in the redistricting context. Some have concluded that race must be the sole motivation behind a particular district shape before strict scrutiny is appropriate.[11] *See Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 278 (2d Cir. 1994) (finding that lower court order did not transgress *Reno* because "it did not instruct the City Council to redistrict *solely*

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[11] This also appears to be the position of the dissent. *See* Dissenting Op. at [13], [15].

on racial grounds")(emphasis added), *cert. granted and judgment vacated and remanded,* 115 S. Ct. 35 (1994); *DeWitt v. Wilson,* 856 F. Supp. 1409 (E.D. Cal. 1994) (stating that *Reno* held "when districts are drawn in such an extremely irregular fashion as to be unexplainable, other than being based *solely* on race, a claim under Equal Protection Clause for racial gerrymandering can be stated") (emphasis added), *petition for cert. filed,* 63 U.S.L.W. 3127 (U.S. Aug. 8, 1994) (No. 94-275). This interpretation presents the attractiveness of being a very literal rendering of *Reno's* emphasis that strict scrutiny should be applied to districts that are so irregular on their face that they "rationally cannot be understood *as anything other* than an effort to 'segregat[e] . . . voters on the basis of race.' " 113 S. Ct. at 2826 (emphasis added). Nevertheless, we agree with the *Hunt* court that this interpretation of *Reno* cannot be correct.

> If [*Reno*] meant no more than the state says it does, it would have precious little practical effect on race based districting, for it would require states to defend the deliberate creation of majority-minority districts under strict scrutiny *only* when they could not come up with any rational explanation for the locaton and shape of those districts other than race. This would seldom be the case, given the wide variety of other districting principles that may be used to justify even the most peculiar-looking districts.

Hunt, 861 F. Supp. at 429.

The Defendants propose that we adopt the triggering test of another court, which has determined that under *Reno* redistricting plans should be subjected to strict scrutiny analysis only when race is the "predominant" factor in the redistricting process. Defs.' Post Trial Br. at 55-56 (citing *Johnson v. Miller,* 864 F. Supp. 1354 (S.D. Ga. 1994), *stay granted,* 115 S. Ct. 36 (1994), *probable*

jurisdiction noted, 115 S. Ct. 713 (1995)). The *Johnson* court describes it [sic] position as follows:

> [I]n order to invoke strict scrutiny, it must be shown that race was the substantial or motivating consideration in creation of the district in question. That term requires that the legislature (a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was the overriding, predominant force determining the lines of the district. If race, however deliberately used, was one factor among many of equal or greater significance to the drafters, the plan is not a racial gerrymander/racial classification subject to strict scrutiny.

Johnson, 864 F. Supp. at 1372. The *Johnson* court expressly crafted this position "to completely remove from constitutional suspicion" those redistricting plans that were well drafted with the specific racial purpose of complying with the Voting Rights Act. *Id.* The *Johnson* court was concerned that following the *Hunt* court "race-a-motivating-factor" triggering test would virtually insure long and protracted litigation for the states every time a state rightfully considers the Voting Rights Act in its redistricting process. *Id.* at 1373. The *Johnson* court was "reluctant to conclude that the Supreme Court intended [in *Reno* for] voting rights litigation to sweep the country at ten-year intervals." *Id.*

Although, we agree with the *Johnson* court that the *Hunt* and *Hays I* courts' "race-a-motivating-factor" triggering test will theoretically subject all redistricting plans that exhibit racial intent to strict scrutiny analysis, including plans that are drawn with the racial purpose of complying with the Voting Rights Act, *see Hunt,* 861 F. Supp. at 433, we decline the ideological invitation to interpret the Constitution based on the prospects of increased litigation. Any developing legal context, like the

arena of legislative redistricting, is bound to produce litigation regardless of the theories that are proposed and adopted.

Instead, we have adopted the "race-a-motivating-factor" triggering test because we find it is consistent with the Supreme Court's equal protection analysis in other contexts. We believe that both the "race-the-only-factor" and the "race-the-predominant-factor" triggering tests are expressly foreign to the Court's equal protection jurisprudence. As the Court noted in *Arlington Heights*:

> *Davis* does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated *solely* by a single concern, or even that a particular purpose was the "*dominant*" or "*primary*" one. . . . When there is a proof that a discriminatory purpose has been a *motivating factor* in the decision, . . . judicial deference is no longer justified.

429 U.S. at 265-66.

State redistricting plans that rightfully consider and apply the mandates of the Voting Rights Act, if challenged under the Equal Protection Clause, likely will incur strict scrutiny under the triggering test that we have adopted, but they will not be condemned automatically to constitutional invalidity. As Justice Powell's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (public higher education), demonstrated, although strict scrutiny may limit the ability of state actors to take race-based remedial action, it does not have to be "strict in theory, fatal in fact," *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring); *see also* Aleinikoff & Issacharoff, *supra*, at 643-45 (arguing that *Reno*, instead of *Crosonizing* reapportionment law, will ultimately be understood to have

Bakked it). So long as a state is careful to narrowly tailor its redistricting plan to meet a compelling state interest, which can include compliance with the Voting Rights Act, the redistricting plan will survive strict scrutiny.

C. *Bizarre District Shapes: A Necessary Element?*

Relying on *Reno*, the Defendants contend that strict scrutiny is not required in this case because "Plaintiffs have not established that any of the districts in [the 1992 plan] are 'bizarre' or 'irregular' " [12] Defs.' Post Trial Br.

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[12] Congruently, as an alternative holding, the dissent concludes that because the 1992 plan contained distircts that were allegedly "regularly drawn, compact, contiguous, and geographically cohesive as required by Article XI of the Ohio Constitution" and because the Plaintiffs lacked evidence to the contrary, the Defendants were entitled to judgment on the Plaintiffs' equal protection claim. Dissenting Op. at [13, 14]. Thus, the dissent asserts that a plaintiff can only state a *Shaw v. Reno* claim if the redistricting plan in question contains districts with bizarre shapes. Such a narrow interpretation of *Shaw v. Reno*, however, ignores the logical conclusion that if bizarre district shapes, as circumstantial evidence, are sufficient to state an equal protection claim under *Shaw v. Reno*, then certainly other direct or circumstantial evidence of race-based districting should also be sufficient to state an equal protection claim under *Shaw v. Reno*.

Moreover, the dissent's narrow reliance on traditional districting principles constitutes a logical fallacy. The presupposition of the dissent's conclusion is that if districts are drawn on the basis of traditional districting principles—compactness, contiguity, etc., then such districts cannot be the result of racial gerrymandering. Although the Court has noted that adherence to traditional districting principles is an "objective factor[] that *may* serve to defeat a claim that a district has been gerrymandered on racial lines," *Reno*, 113 S. Ct. at 2816 (emphasis added), it is certainly logically possible that districts could be crafted within the confines of traditional districting principles and be based on race at the same time. Thus, the dissent affords a preclusive constitutional significance to a state's compliance with traditional districting principles that not only exceeds the significance afforded by the Court, *see id.*, but also leads to a fallacious legal conclusion.

at 55. This raises the question of whether the presence of bizare district shapes is a necessary element to trigger strict scrutiny in a *Shaw v. Reno* claim.

Undeniably, the Court in *Reno* emphasized that the new cause of action under the Fourteenth Amendment was based on the presence of districts whose shapes were so irregular or bizarre that they rationally could not be understood as anything other than an effort to segregate voters on the basis of race. 113 S. Ct. at 2828, 2832. Such districts, however, do not draw close constitutional review simply because of their irregular shape. Adherence to traditional districting principles, such as compactness, contiguity, and respect for political subdivisions, is not a constitutional requirement. *Id.* at 2827 (citing *Gaffney v. Cummings*, 412 U.S. 735, 752 & n.18 (1973)). Rather, bizarre-shaped districts demand strict scrutiny because their shape is circumstantial evidence that race has been a purposeful factor in their creation. *See Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring) ("One need not use Justice Stewart's classic definition of obscenity—'I know it when I see it'—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation." (footnotes omitted)). Logically, therefore, the Supreme Court's use of a district's shape as circumstantial evidence of racial intent implies that proof can be made "by any means, including state concession, bizarre shape, or some combination of the various factors typically used to prove the 'intent' element of an equal protection claim under *Arlington Heights*." *Hunt*, 861 F. Supp. at 431; *see Arlington Heights*, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."). Virtually all the courts that have addressed this matter are in agreement with this conclusion. *See Johnson*, 864 F. Supp. at 1374 ("The Supreme

Court's use of a district's shape as circumstantial evidence of legislative intent implies that proof might be made by other means. . . . This is clearly the correct approach."); *Hays I*, 839 F. Supp. at 1195 ("If everyone—or nearly everyone—involved in the design and passage of a redistricting plan asserts or concedes that design of the plan was driven by race, then racial gerrymandering may be found without resorting to the inferential approach approved by the Court in *Shaw*."). Thus, regardless of whether the evidence is direct or circumstantial or whether bizarre district shapes are present or not, if the evidence indicates that race was a substantial or motivating factor in the apportionment plan, then a *Shaw v. Reno* claim is stated and strict scrutiny analysis is required.

D. *Burden of Proof*

The parties agree that the Plaintiffs in this equal protection challenge bear the utimate burden of persuasion throughout the proceeding. *See Batson v. Kentucky*, 476 U.S. 79, 93-94 & n.18 (1986); *Wygant*, 476 U.S. at 277-78. If the Plaintiffs offer proof that the redistricting plan is race-based, then this gives rise to a presumption that the plan is unconstitutional, and the burden shifts to the Defendants to demonstrate that their use of race was narrowly tailored to meet a compelling state interest. *See Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436. Yet, the Defendants' shifted burden is one of production only, not persuasion. The Plaintiffs still bear the ultimate burden of persuading the court that the Defendants did not have a compelling state interest that justified their use of race in apportionment process or that the Defendants' redistricting plan was not narrowly tailored to meet such an interest. *See Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring); *Hunt*, 861 F. Supp. at 436.

E. *Compelling State Interest*

Next, we consider those reasons that might serve as a compelling state interest, justifying a state's decision to

engage in race-based redistricting. At this point, we are not concerned with whether the Defendants had a compelling jusitfication for their consideration of race in the 1992 plan; we are concerned with whether the Defendants had a compelling justification for *any* redistricting plan that considered race as a substantial or motivating factor. The question of "whether the particular plan under challenge takes race into account to a greater degree than necessary to further a compelling state interest is a question for the 'narrowly tailored' prong of the strict scrutiny analysis, which examines the 'fit' between the compelling state interest and the precise means chosen by the state to accomplish it." *Hunt*, 861 F. Supp. at 437 (citing *Wygant*, 476 U.S. at 280 & n.6, and *Fullilove*, 448 U.S. at 507 (Powell, J., concurring)). Without presenting an exhaustive review of those reasons that theoretically might serve as a compelling state interest in the redistricting context, we have chosen to limit our discussion to the compelling interest that the Defendants have offered in this case—compliance with secton 2 of the Voting Rights Act. Defs.' Post Trial Br. at 57-63.

In *Shaw v. Reno*, the state argued that compliance with the Voting Rights Act was a compelling state interest. 113 S. Ct. at 2830. The Court, however, stopped short of totally endorsing this claim: "The states certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied." *Id.* Obviously, the Court is aware that in strict scrutiny parlance a "compelling state interest" is a term of art. Thus, we do not think the Court's choice of the words "very strong interest" is insignificant. It suggests to us that the Voting Rights Act may serve as a compelling state interest in some circumstances, but in others, state action in conformity therewith may violate the Equal Protection Clause of the Fourteenth Amendment. *See Johnson*, 864 F. Supp. at 1381; *see also Johnson v. De Grandy*, 114 S. Ct. 2647, 2666-67 (1994)

(Kennedy, J., concurring) ("Given our decision in *Shaw*, there is good reason for state and federal officials with responsibilities related to redistricting [that are engaging in remedial action pursuant to section 2 of the Voting Rights Act], as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause.").

Previously, the Court has recognized a state's compelling interest in taking race-based remedial measures to eradicate the effects of past racial discrimination. *Reno*, 113 S. Ct. at 2831 (citing *Croson*, 488 U.S. at 491-93; *Wygant*, 476 U.S. at 280-82). Furthermore, the Court has recognized that this interest extends to remedying past or present violations of federal statutes that were intended to eliminate discrimination in specific aspects of life. *See Croson*, 488 U.S. at 500 ("constitutional or statutory violation"); *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring) ("violation of federal statutory or consitiutional requirements"). Moreover, the Court has clarified that a state does not have to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277); *Hunt*, 861 F. Supp. at 437.

Applying these principles to the redistricting context and the Voting Rights Act, the *Hunt* court developed a very useful standard by which to determine when the Voting Rights Act can serve as a compelling state interest:

> Under these principles, we think it clear that a state has a "compelling" interest in engaging in race-based redistricting to give effect to minority voting strength whenever it has a "strong basis in evidence"

> for concluding that such action is "necessary" to prevent its electoral districting scheme from violating the Voting Rights Act.
>
> . . . .
>
> A state has a "strong basis in evidence" for concluding that it must engage in race-based redistricting in order to comply with the Voting Rights Act when it has information sufficient to support a *prima facie* showing that its failure to do so would violate the Act. *See Croson*, 488 U.S. at 500 (majority) (evidence "approaching a prima facie case of a constitutional or statutory violation").

Hunt, 861 F. Supp. at 437-439; *see Johnson*, 864 F. Supp. at 1381; *Hays I*, 839 F. Supp. at 1217 (Walter, J., concurring).

Generally, to establish a prima facie case that a single-member redistricting plan violates section 2 of the Voting Rights Act, a plaintiff must show three things, the *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))); *Johnson*, 864 F. Supp. at 1387; *Hunt*, 861 F. Supp. at 440. Thus, when a state has reliable information that indicates the relevant minority group could establish a prima facie challenge under section 2 of the Voting Rights Act to the existing districting plan, then it has a "strong

basis in evidence" for concluding that it must engage in race-based redistricting to comply with section 2 of the Voting Rights Act, and it has established a "compelling interest" for the remedial measures. *Hunt*, 861 F. Supp. at 440; *see Hays I*, 839 F. Supp. at 1217 (Walter, J., concurring).

F. *Narrowly Tailored*

Finally, we consider how to determine whether a racial gerrymander, if justified by a compelling state interest, is narrowly tailored to further that interest. The Court provided little help with this issue in *Reno*, other than to say that in the context of a challenge under section 5 of the Voting Rights Act, "[a] reapportionment plan would not be narrowly tailored if the State went beyond what was reasonably necessary to avoid retrogression." Therefore, we agree with the *Hunt* and *Hays I* courts that the best analytical approach is to examine the Court's decisions that apply the narrowly tailored standard in other race-based remedial contexts. *See Hunt*, 861 F. Supp. at 444-45; *Hays I*, 839 F. Supp. at 1206-09, 1215 (majority and concurring opinions).

In other race-based contexts, the Court has examined five factors to determine whether a race-based affirmative action plan is narrowly tailored to serve the compelling state interest in remedying the discrimination: (1) the efficacy of alternative remedies that were less race-based or race-neutral; (2) whether the plan utilizes a fixed racial quota or a flexible racial goal; (3) the duration of the plan; (4) the relationship betweent he plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates; and (5) the impact of the plan on the rights of third parties. *See United States v. Paradise*, 480 U.S. at 149, 171-85 (1987) (plurality); *Local 28 Sheet Meal Work-*

ers' Int'l Ass'n v. EEOC, 478 U.S. 421, 485-89 (1986) (Powell, J., concurring); *see also Croson*, 488 U.S. at 507-08; *Wygant*, 476 U.S. at 279-84. Although these criteria were developed in contexts other than race-based redistricting, we think they are easily adapted to this context. While we have engaged in a rigorous analysis, our inquiry has been careful and sensitive.

Considering the first factor, a court must decide whether the state could have accomplished its compelling interest by some means that was less race-based or race-neutral. *Wygant*, 476 U.S. at 280 n.6. If compliance with the Voting Rights Act is a state's compelling interest then, obviously, a race-neutral alternative does not exist. Assuming race must be considered to comply with the Voting Rights Act, the question then becomes whether a state could have complied with the Voting Rights Act with means that were less race-based. The Plaintiffs in this case do not allege that the Apportionment Board created more majority-minority districts than is reasonably necessary to comply with the Voting Rights Act. Rather, they generally claim that the Board packed black voters into districts to comprise less than a majority, where a black minority population, in conjunction with significant white crossover votes, already had ample opportunity to elect the candidate of its choice without the addition of the black voters. This packing of black voters into districts where they were not needed allegedly resulted in a waste of black votes in the "packed" districts and a loss of minority "influence" in those districts where the black voters were previously located. Assuming *arguendo* that such race-based measures truly further compliance with section 2 of the Voting Rights Act, the analytical question becomes a two-fold concern: whether the 1992 plan creates more "packed" districts than is reasonably necessary to comply with the Act and whether the "packed" districts it creates contain substantially larger concentrations of minority voters than is reasonably necessary to give mi-

nority voters a realistic opportunity to elect representatives of their choice in those districts. *See Hunt*, 861 F. Supp. at 446; *Hays I*, 839 F. Supp. at 1206-08.

Regarding the second factor, a court must determine whether the challenged plan requires a fixed racial quota that is crafted to achieve a racial balance or requires a flexible goal to be used as a standard in gauging the state's efforts at eradicating the discrimination in question. *See Sheet Metal Workers*, 478 U.S. at 477-78. We agree with the *Hunt* court that racial gerrymanders will "seldom be invalid on this ground" because they do not impose a fixed racial quota. 861 F. Supp. at 446. Even if a state creates a certain number of districts that are designed to elect minority representatives, there is no guarantee that minority representatives will be elected. Thus, such districts can hardly be viewed as anything other than examples of an acceptable, flexible goal for minority representation. *See Sheet Metal Workers*, 478 U.S. at 487-88.

The third factor invokes consideration of the planned duration of the remedial measure. If it is not a temporary provision, it may last longer than reasonably necessary to eliminate the effects of the targeted discrimination. *See id.* at 479 (noting that a temporary race-based remedial measure is acceptable because it "will end as soon as . . . it is no longer needed to remedy past discrimination"). A race-based redistricting plan in Ohio will likely satisfy this test because the State is required, as a practical matter, to redistrict after each decennial census, and this will result in re-consideration and possible termination of the previous race-based plan.

The fourth factor requires the court to consider whether the remedial plan presents a reasonable relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of

eligible candidates. As applied to the redistricting context, we think this requirement is satisfied so long as the percentage of racially-packed districts does not substantially exceed the percentage of minority voters throughout the state. *See Johnson v. De Grandy*, 114 S. Ct. at 2658 & n.11 (noting that ultimate right of section 2 of Voting Rights Act is minority voters' equal opportunity to elect candidate of their choice, as measured by proportionality between percentage of majority-minority voting districts in state to minority members' share of the relevant population throughout the state).

The fifth factor requires a court to consider whether the challenged plan "impose[s] an unacceptable burden on innocent third parties." *Paradise*, 480 U.S. at 182. As applied to the redistricting context, we agree with the *Hunt* and *Hays I* courts that "a race-based redistricting plan imposes an unacceptable burden upon third parties, [and] hence is not sufficiently 'narrowly tailored' to survive constitutional muster, if it fails to comply with redistricting principles that are themselves constitutionally mandated, like the 'one person, one vote' standard and the prohibition against undue dilution of the voting strength of any identifiable group of voters." *Hunt*, 861 F. Supp. at 449; *see Hays I*, 839 F. Supp. at 1208. Like the *Hunt* court, however, we do not think that a racial gerrymander imposes an unacceptable burden on third parties simply because the redistricting plan has a bizarre shape or deviates from traditional districting principles, which, themselves, are not constitutionally mandated.[13] *Hunt*, 861 F. Supp. at 449-56.

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[13] Consider the words of Chief Justice Warren Burger in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), where the Court considered and approved the use of race-sensitive remedies to combat segregated schools. "The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations; and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the

At this point we note that it is important for all the issues presented in this case to be analyzed in a way that gives expression to the constitutionally and statutorily based national goal of protecting the rights of persons victimized by historic discrimination, so that they may effectively participate in changing public policies to "ensure nondiscrimination and fair opportunities in education, employment, housing, and other areas." Arthur A. Baer & Pamela S. Karlan, *Voting Rights Act Enforcement: An Agenda for Equal Electoral Opportunity, in New Challenges, The Civil Rights Record of the Clinton Administration Mid-term* 169 (Report of the Citizen's Commission on Civil Rights, 1995).

Court decisions of today must be mindful of the Supreme Court's admonition over one hundred years ago in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), that the right to vote is a "fundamental political right, because preservative of all rights." The unanswered questions in *Shaw v. Reno* must not be responded to in such a way as to gut the Voting Rights Act's promise of equal electoral opportunity. When minority voters are packed into a district where they are unnecessary to the election of the minority's candidate of choice, who is capable of "changing public policies," such a plan must be justified by a compelling governmental purpose. This is particularly true when the effect of such a scheme is likely to be to reduce the opportunity for minority voters to coalesce with other voters to influence the election of candidates of their choice in the districts from which they are drawn. When this occurs the very spirit of the Voting Rights Act is eroded. The risk has prompted us to reject portions of the 1992 plan at issue here.

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interim period when remedial adjustments are being made to eliminate the dual school system." *Id.* at 28.

III. Findings of Fact and Conclusions of Law

Based on our review of the evidence submitted by both parties, we find, for the following reasons, that race was a substantial and motivating factor in the Defendants' 1992 apportionment plan:

1. The Plaintiffs claims of racial gerrymandering are somewhat unsual in this case. First, they allege that the Defendants drew race-based legislative districts in the urban areas of Ohio and that this decision had the ripple effect of causing irregular shaped districts throughout the State, which violated the traditional districting principles embodied in the Ohio Constitution, particularly Article XI, § 7. Pls.' Second Am. Compl. ¶ 55. In addition, the Plaintiffs alleged that some of the race-based districts, themselves, had irregular shapes in violation of the traditional districting principles contained in the Ohio Constitution. *Id.* Finally, the Plaintiffs alleged that the racially gerrymandered districts "included" House districts 31, 30, 22, 21, 38, 39, 44, and 49. *Id.* ¶ 56. The Defendants contend that the Plaintiffs are limited to challenging only these eight districts, which were identified in their complaint. The Defendants, however, mischaracterize the Plaintiffs' complaint. The word "included" clearly is not an exclusive term. Thus, the eight districts identified in the complaint were illustrative of the alleged race-based districts but not necessarily an exclusive listing of them. That said, however, we note that we are not concerned with districts whose irregular shape may have been the ripple effect of another district that was racially gerrymandered. Such an irregular district may indeed violate proscriptions of the Ohio Constitution, but the focus of a *Shaw v. Reno* claim is racial gerrymandering in violation of the Fourteenth Amendment to the United States Constitution. Thus, we are only concerned in this case

with districts that allegedly have been racially gerrymandered.

2. The Defendants admittedly considered race when drafting their 1992 apportionment plan. The Apportionment Board instructed Tilling to "draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act," and Tilling attempted to comply. Hr'g Tr. at 208. Tilling considered race to avoid dilution of minority voting strength in violation of the Voting Rights Act. *Id.* at 308.

3. Before Tilling drafted an apportionment plan, he attended public hearings throughout the state. At these hearings the Apportionment Board heard testimony from some members of the minority community requesting the Board to enhance minority voting strength by creating more majority-minority districts. Defendants' Post-Trial Br. at 2-3. At these hearings, Tilling publicly stated that consideration of and compliance with the Voting Rights Act was an important principle guiding the apportionment process. *Id.* at 3-5.

4. The Apportionment Board's Findings and Conclusions, adopted on February 18, 1992,[14] in support of the 1992 plan, also reveal that race was a substantial and motivating factor in the apportionment process. Based on the conclusions that the Voting Rights Act protected classes of voters, not incumbents, *see, e.g.*, Bd. Findings ¶¶ 177, 183, and that racial bloc voting existed throughout the State of Ohio, including districts containing minority voters,

[14] The Apportionment Board has not met since February 18, 1992, either to change or modify its findings regarding the 1992 plan. Thus, these findings constitute direct evidence of the Apportionment Board's rationale and justification for the 1992 plan.

id. ¶¶ 124, 167, the Apportionment Board decided that it needed to create districts that would contain sufficient black population to guarantee the election of any new (non-incumbent) black candidate. Thus, the Board through Tilling added black voters to minority districts outside of Cuyahoga County because "there [wa]s insufficient black population in the minority districts to guarantee the election of a black candidate particularly given levels of voter turnout and racial bloc voting in the district." *Id.* ¶ 168. Obviously, one of the working assumptions in this process was that black voters would choose a black candidate as their representative.

5. The Board's analysis of incumbency elections in minority districts for 1984, 1986, 1988, and 1990, revealed an incubency advantage of six to ten percent, *id.* ¶ 171, 173, and the Board concluded that it was unreasonable to configure districts based on the current incumbent because the successful incumbents might retire, die, or move on to other political positions during the 90's, *id.* at 172. *See also* Bd. Conclusion of Law ¶ 9 ("It is unreasonable to reconfigure minority districts based on the electoral success of minority incumbents. Further, such reconfiguration will result in impermissible minority vote dilution. Consideration of factors such as racial bloc voting, voter turnout, population shifts, demographics, incumbency factors, voting patterns and other such factors require that minority districts outside Cuyahoga County must reflect increased relative percentages of black voting age population.") Accordingly, the Board determined that "unless Black Voting Age Population margins are adopted in minority districts, minorities risk losing minority districts." Bd. Findings ¶ 174.

6. In Franklin County, the Board drew district lines to enhance the possibility of electing a new black can-

didate. Board Finding 189 indicates that Tilling "reconfigured House districts 29 and 31 in Franklin County to protect minority voters in those districts and to create a minority Senate District in Franklin County where none previously existed." *Id.* ¶ 189. Tilling testified that the incumbent black legislators, Reps. Miller and Beatty, had indicated a desire to run for different offices, and because the Voting Rights Act protects classes of voters and non incumbents, black voters were added to the districts of Reps. Miller and Beatty to achieve this goal. *Id.* ¶ 189. The percentage of black population in Rep. Miller's district, H.D. 22 under the 1992 plan, was increased from 38.50% to 44.68%, a 6.18% increase, which is within the 6-10% standard that would be necessary to compensate for the possible loss of incumbency advantage. Defs.' Supp. Exs., Vol. I, Ex. DD. Likewise, the black population in Rep. Beatty's district, H.D. 21 under the 1992 plan, was increased from 46.80% to 54.30%, an increase of 7.50%. *Id.* Both Miller and Beatty previously had been elected to six and seven terms, respectively, Bd. Findings ¶ 162, by pluralities of better than two-to-one.

7. In Lucas County, the Board drew lines to enhance the possibility of electing a new black candidate. Tilling stated that he drew the districts in Lucas County "to protect a class of voters, not the particular incumbent in that situation." *Id.* ¶ 177. Tilling added additional minority votes to Rep. Casey Jones' district, H.D. 49 under the 1992 plan, "not because Casey Jones needed them but because down the road in this decade whoever is his successor needs the opportunity to give minorities a clear chance to elect a candidate of their choice." *Id.* Moreover, Tilling accepted the rationale of increasing minority voters in Casey Jones' district because the growth of the University of Toledo had displaced

a number of individuals, causing some shift of population in his district, and because Jones might be nearing retirement age. *Id.* ¶ 195. The black population in Jones' district was increased from 41.70% to 49.99%, an increase of 8.29%. Defs.' Supp. Exs., Vol. I, Ex. DD.

8. In Summit County, the Board drew lines to enhance the possibility of electing new black candidates. Based on the conclusion that Rep. Vernon Sykes' district, H.D. 44 under the 1992 plan, was "losing black population and to avoid minority vote dilution." Bd. Findings ¶ 194, the Board increased the black population in Sykes' district from 35.40% to 43.07%, an increase of 7.67%. Defs.' Supp. Exs., Vol. I, Ex. DD. Previously Sykes had been elected to five terms by margins of two-to-one. Bd. Findings ¶ 162.

9. In Montgomery County, the Board drew lines to guarantee the election of new black candidates. Again, based on "population shifts" and the desire to "avoid dilution of minority voting," the Board increased the black population in Rep. McLin's and Rep. Roberts' districts, H.D. 38 and H.D. 39, respectively under the 1992 plan. *Id.* ¶ 193. The black population in McLin's district was increased from 42.10% to 44.47%, an increase of 2.30% and the black population in Roberts' district was increased from 36.10% to 40.69%, an increase of 4.59%. Defs.' Supp. Exs., Vol. I, Ex. DD.

10. In Hamilton County, the Board drew lines to enhance the possibility of electing new black candidates. The Board found the following:

> Mr. Tilling, in drafting the 1991 Apportionment Plan, also determined that the Voting Rights Act protected classes of voters not incumbents. Since Representative Mallory is in

> his 60's, there is a particular need to reconfigure House District 23 [H.D. 31 in the 1992 plan] to increase the relative percentage of black population in that district in order to provide an opportunity for a new black candidate, without the benefit of incumbency, to be elected in the district.

Bd. Findings ¶ 183. Accordingly, the Board increased the black population in Mallory's district from 45.90% to 49.16%, an increase of 3.26%. Defs.' Supp. Exs., Vol. I, Ex. DD. The Board also increased the black population in Rep. Rankin's district, H.D. 30 in the 1992 plan, from 53.20% to 55.98%, an increase of 2.78% in a district that was already a majority-minority district. *Id.* The Board increased the black population in Rankin's district allegedly because "[a] new black candidate would require a district with increased black population to be successful." Bd. Findings ¶ 186.

11. In addition to the Apportionment Board's Findings and Conclusions, Tilling, who was the principal architect of the apportionment plan, kept handwritten notes that indicated his procedure and his use of race in drawing the original apportionment plan. *See* Pls.' Ex. Prior Proceeding B, No. 120. The notes revealed that in his first five steps Tilling calculated the ideal population size of the Senate and House districts, pursuant to Article XI, Section 2 of the Ohio Constitution, and determined those counties that had populations within five percent of the ideal in accordance with Article XI, Section 10 of the Ohio Constitution. Beginning with step six and continuing with each urban county thereafter, the notes repeatedly indicate that Tilling displayed the minority population of each urban county on his computer screen and then drew the "minority districts" first before proceeding. This process and the atten-

tion to racial composition was confirmed at the hearing when Tilling testified concerning the maps of the urban districts drawn in accordance with the process contained in the notes. Hr'g Tr. at 344-51. Viewed sequentially, the maps indicated that for each urban county, the minority population was displayed; the omst heavily black districts were drawn first; and each succeeding district that was drawn contained a decreasing percentage of black population. The Plaintiffs claim that the maps in conjunction with the notes establish that race was "the predominant concern of Mr. Tilling and the Board." Pls.' Post Trial Br. at 14. The Defendants contend that Tilling's notes and the corresponding maps are irrelevant because they refer to the original "model" plan that Tilling submitted to the Board on September 26, 1991. Although it is true that this exact plan was never in effect and was modified on numerous occasions, we still find it probative of the Defendants' consideration of race in the redistricting process. The fact remains that a not-too-distant forerunner of the 1992 plan was drawn in the aforementioned manner, and the Defendants do not contend that the 1992 plan totally discarded the procedure and results of the original plan.[15]

12. Based on the foregoing facts, we conclude that race was a substantial and motivating factor in the Defendants' creation of House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan. These House

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[15] The dissent agrees that the notes of Tilling "strongly suggest that he purposefully considered race when he drew the house district boundaries in Amendment D" and that this evidence of race-based action should trigger strict scrutiny. Dissenting Op. at [17 n.9]; *see also* Dissenting Op. App. A. ¶¶ 21, 23, 30, 38, 45, 53, 60, 68, and 75. Nevertheless, the dissent totally ignores the better and more complete direct evidence of the Board's race-based redistricting that was contained in the Board's findings and Conclusions, which were adopted specifically in support of the 1992 plan. *See supra* part III., ¶¶ 4-10.

districts are the result of racial gerrymandering. Although none of these districts presents a bizarre shape, both direct evidence from trial testimony and the Apportionment Board's Findings and Conclusions, and circumstantial evidence from Tilling's notes and the accompanying maps, reveal that the Defendants intentionally crafted these eight districts, at least in part, with the purpose of separating voters on the basis of race.[16]

13. Because race was a substantial and motivating factor in the 1992 plan, it must be subjected to strict scrutiny analysis. *Reno*, 113 S. Ct. at 2825, 2826,

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[16] At one point the dissent implies that the Board's use of race in the redistricting process was nothing more than permissible "race-consciousness." Dissenting Op. at [16] ("In reality, the plaintiffs seek an expansion of *Shaw v. Reno* to include any reapportionment plan that is race-conscious and, in so doing, to expand the realm of judicial supervision to every reapportionment plan."); *Id.* at [21] ("[T]he plaintiffs . . . have failed to prove that the race-conscious concerns of the majority members of the Ohio Reapportionment Board constituted a substantial and motivating factor in the drawing of the boundary lines for the eight challenged districts."). The real expansion, howeevr, appears to have occurred in the dissent's definition of "race-consciousness."

Earlier we noted under previous Court precedent that race-consciousness districting was simply taking action with the knowledge or awareness that it is likely to have a particular racial impact but race-based districting, which triggers strict scrutiny, is taking action with the specific intent or purpose to bring about such an impact. *See supra* part II.B. Cleraly, the evidence presented in this case reveals that the Defendants intentionally crafted these eight districts with the purpose of separating voters on the basis of race. Thus, their action is correctly characterized as race-based instead of race-conscious.

Our collegaue later recognizes this in his dissent when he admits that the "notes of James R. Tilling strongly suggest that he purposefully considered race when he drew the house district boundaries reflected in Amendment D and challenged here. Since citizens were at least in certain parts of the State, classified by race, the eight challenged districts arguably must be subjected to strict scrutiny." Dissenting Op. at [17 n.9].

2830. Thus, the burden of production shifts to the Defendants to show that the 1992 plan was narrowly tailored to meet a compelling state interest. *See Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436.

14. The Defendants claim that compliance with section 2 of the Voting Rights Act was the compelling state interest that justified their race-based redistricting. Defs.' Post Trial Br. at 57-63.

15. The Defendants agree that in order to show that section 2 of the Voting Rights Act was a compelling state interest, they must have a strong basis in evidence that race-based redistricting was necessary as a remedial measure to comply with the Voting Rights Act. *Id.* at 59-60. Moreover, the Defendants agree that a state has a "strong basis in evidence" to conclude that it needs to engage in race-based redistricting to comply with section 2 of the Voting Rights Act when the state has information that is reasonably sufficient to lead it to conclude that the relevant minority group could make out a prima facie section 2 challenge to the existing plan. *Id.* at 59, 60, 63.

16. As we noted earlier, a plaintiff can establish a prima facie case of a violation of section 2 of the Voting Rights Act by providing evidence that satisfies the three *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constittue a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))).

17. Assuming without holding that the Defendants possessed information that would lead them to reasonably conclude that a plaintiff could satisfy the first two *Gingles* factors, we hold that the Defendants did not have a "strong basis in evidence" to engage in race-based redistricting in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan because they did not possess information that would reasonably lead them to conclude that a plaintiff could satisfy the third *Gingles* factor in these districts—the presence of racial bloc voting.

18. Both this court and the Supreme Court previously held on the basis of all the evidence, that racially polarized voting generally did not exist in Ohio's legislative elections. The Court noted the following:

> [A]ppellees [Plaintiffs in this case] have failed to demonstrate *Gingles'* third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The District Court specifically found that Ohio does not suffer from "racially polarized voting." 794 F. Supp. at 700-01. Accord. App. to Juris. Statement 132a-134a, and n.2, 139a-140a. Even appellees agree. *See* Tr. of Oral Arg. 25. Here, as in *Gingles*, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Gingles*, 478 U.S. at 49 n.15, 106 S. Ct. at 2766 n.15.

Quilter, 113 S. Ct. at 1158; *see also Quilter*, 1992 WL 677145, at *4 & n.2, n.3, *8 (holding that

Ohio has coalitional voting, where whites cross over and vote for black candidates, and not polarized voting, where whites vote for white candidates and blacks vote for black candidates). By relying on these precedents, we are not saying that the Apportionment Board could not take race into account unless and until it had been proven in a court that a violation of section 2 of the Voting Rights Act had occurred. As we noted earlier, a state is not required to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson,* 488 U.S. at 500 (quoting *Wygant,* 476 U.S. at 277). Our point in noting the previous rulings of this court and the Supreme Court regarding the absence of polarized voting in Ohio was to emphasize that what was readily and reasonably apparent to and held by the courts, also should have been reasonably apparent to the Defendants—racially polarized voting generally does not exist in Ohio's legislative elecitons.[17]

19. The Defendants contend that Tilling reasonably concluded that "racial bloc voting existed throughout Ohio." Defs.' Post Trial Br. at 62 & n. 45. Yet, the bivariate regression analysis of the Plaintiffs' expert, Dr. Henderson, for the election years 1990, 1986, and 1984, revealed the presence of coalitional voting in each of the districts where the Defendants, through

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[17] We note, however, one exception. In *Armour v. Ohio,* 775 F. Supp. 1044 (N.D. Ohio 1991), the district court held that the two House districts, 52 and 53, under the 1981 redistricting plan, which were located in Mahoning County, violated section 2 of the Voting Rights Act. The court found under a totality of the circumstances analysis that racially polarized voting existed in these two districts.

Tilling, chose to engage in race-based redistricting in the 1992 plan. *See Quilter,* 1992 WL 677145, at *4 & n.2. The percentage of white cross-over vote in each of those districts was as follows: Rep. Mallory—50.66%; Rep. Rankin—50.93%; Rep. Miller—44.50%; Rep. Beatty—50.25%; Rep. McLin—35.44%; Rep. Roberts—45.98%; Rep. Sykes—48.76%; Rep. Jones—44.46%. *Id.* at *4 n.2. Prior to the time that the Defendants adopted "Amendment D," the 1992 plan, their own expert, Dr. King, analyzed over 200 elections throughout Ohio, and he concluded that a "degree of racially polarized voting existed in Ohio," but he was not willing to characterized the degree of racial polarization as "legally significant." Defs.' Post Trial Br. at 63 & n. 47. Regardless of Dr. King's ability to comment on the "legal" significance of his analyses, the fact remains that Dr. King did not challenge Dr. Henderson's results on this point. *See Quilter,* 1992 WL 677145, at *4 n.3. Dr. King's own results regarding polarized voting in Ohio revealed that on average 95% of blacks voed for black candidates and 56.7% of whites voted for black candidates, thereby confirming Dr. Henderson's results. *Id.* at *4 n.2. In the Apportionment Board's Findings and Conclusions, the Board even admitted the presence of white cross-over voting in the minority districts where race-based remedial measures were utilized. Bd. Findings ¶ 168. Given the overwhelming statistical evidence of coalitional voting in the challenged districts under the existing plan, and given the fact that the Defendants had this information available to them before they adopted the 1992 plan, with its race-based remedial measures, we find that the Defendants could not reasonably conclude that the relevant minority group could establish a prima facie case of a violaiton of section 2 of the Voting Rights Act in the challenged districts. Significant evidence

of white majority bloc voting in these Ohio legislative districts did not exist.

20. Because the Defendants did not possess a strong basis in evidence that they needed to engage in race-based redistricting to comply with section 2 of the Voting Rights, the Act does not provide a compelling state interest to justify the remedial action.[18] *See Hunt*, 861 F. Supp. at 440.

21. Because the Apportionment Board lacks a compelling state interest for its racial gerrymandering in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan,[19] we conclude that these districts

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[18] The dissent concludes that the "State of Ohio . . . has the compelling state interest of complying with the Voting Rights Act." Dissenting Op. at [18]. As support for this holding, the dissent relies on the district court's decision in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), where the court held that the two house districts, 52 and 53, located in Mahoning county under the 1981 redistricting plan violated section 2 of the Voting Rights Act, the Fifteenth Amendment to the United States Constitution, and section 7(C) of Article XI of the Ohio Constitution. The dissent implies that our instant finding that section 2 of Voting Rights Act did not constitue a compelling state interest to justify the Board's racial gerrymandering in the eight challenged House districts, is somehow inconsistent with the court's decision in *Armour*. In actuality, the two decisions present no conflict. The finding of racially polarized voting and a Voting Rights Act violation in one county of Ohio, does not necessarily mean that such evidence will be found in every county of Ohio. The House districts in Mahoning County under the 1992 plan were not even challenged in the instant case. To engage in race-based redistricting so as to remedy potential violations of section 2 of the Voting Rights Act, the Board must analyze the voting patterns in each district under the previous plan to determine if prima facie evidence of a section 2 violation exists. If such evidence does not exist in a given district, then the Board cannot engage in race-based redistricting in that district simply because a Voting Rights Act violation was found in another district in a different part of of the State.

[19] In dissent, our colleague concludes that the Apportionment Board did have another compelling interest that justified its racial

violate the Equal Protection Clause of the Fourteenth Amendment. Based on our holding, we find

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gerrymandering: compliance with Article XI of the Ohio Constitution, which contains Ohio's mandate to utilize traditional districting principles in the redistricting process. Dissenting Op. at [18]. This conclusion is erroneous for a number of reasons.

First, no previous court has held that a state's interest in complying with its own constitution provides a *compelling* justification to engage in racial gerrymandering. The dissent cites case law, which holds that states do have a legitimate interest in complying with the traditional districting principles embodied in their state constitutions. Dissenting Op. at [18]. No court, however, has ever held in the context of an equal protection challenge and in the face of direct evidence of racial gerrymandering that a state's interest in complying with its traditional districting principles provided compelling justification to engage in racial gerrymandering. Even the Defendants, themselves, do not make such a claim. To be sure, the Defendants argued that the Apportionment Board's compliance with Article XI of the Ohio Constitution indicated that it did not engage in racial gerrymandering and that strict scrutiny accordingly was not required. *See* Defs.' Trial Br. at 6-14, 61-64; Defs.' Post Trial Br. at 45-56. Nevertheless, even the Defendants realized that if this court determined that strict scrutiny was triggered by evidence of racial gerrymandering, the Defendants' only viable compelling interest sufficient to justify such race-based redistricting would be the Board's interest in complying with the mandates of section 2 of the Voting Rights Act. Thus, the Defendants relied solely on the Voting Rights Act as compelling justification for their race-base redistricting, once such a condition was determined, and did not even proffer compliance with the Ohio Constitution as a compelling justification. *See* Defs.' Post Trial Br. at 56-63.

Second, the dissent's conclusion defies logical reasoning. Without reiterating the Fourteenth Amendment's aversion toward race-base classifications, suffice it to say that our earlier analysis of Supreme Court precedent revealed that a state's purposeful use of race can only survive strict scrutiny if it is remedial in nature and substantially supported by evidence of past racial discrimination. *See Reno*, 113 S. Ct. at 2831 (citing *Croson*, 488 U.S. at 491-93; *Wygant*, 476 U.S. at 280-82). For example, in the context of our discussion of the Voting Rights Act as a compelling state interest, we noted that compliance with Voting Rights Act could serve as a compelling justification to engage in race-based redistricting so long as substantial evidence was present to indicate the need for

such remedial action. *See supra* part II.E. Compliance with the Voting Rights Acts, which was promulgated as a remedial measure for racial discrimination in the voting context, will clearly require that the apportioning entity purposefully consider race. Obviously, compliance with the traditional districting principles in the Ohio Constitution does not qualify as such a compelling interest. The Apportionment Board did not have to purposefully consider race so as to remedy past racial discrimination in order to comply with the traditional districting principles in the Ohio Constitution. The traditional districting principles in Article XI were clearly designed wtih the purpose of eliminating all forms of bias from the redistricting process. *See* Ohio Const. art. XI. Thus, to conclude that the Board's interest in complying with these principles justified their racial gerrymandering is absurd.

Finally, even if we did conclude that compliance with the traditional districting principles in Article XI could constitute a compelling state interest justifying racial gerrymandering, the Defendants would still lose because the evidence reveals that the Apportionment Board did not comply with section 7(D) of Article XI. Section 7(D) reads as follows:

> In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article.

Ohio Const. art. XI, § 7(D). Forty-four pre-existing 1981 House districts were available for retention pursuant to section 7(D) because they fell within the population parameters established by section 3. *See* Pls.' Post-Hr'g Br. at 37. The Plaintiffs demonstrated through an alternative redistricting plan, the "7D plan," that thirty of the forty-four districts could, indeed, have been maintained. *Id.* The Defendants, however, destroyed all but seven of these pre-existing House districts. *Id.*; Dissenting Op. App. A, ¶ 13.

The Defendants retained only seven of the pre-existing house districts predominantly because they interpreted and applied the provisions under section 10 of Article XI, which delineates the creation and numbering of House districts, as taking precedence over section 7(D). In fact, the dissent agreed with the Defendants' interpretation of Article XI of the Ohio Constitution. Dissenting Op. at [13]. Nevertheless, section 10 explicitly states that the creation of districts pursuant to section 10 is to be governed by earlier sections of Article XI, including section 7:

> The standards prescribed in sections 3, 7, 8, and nine of the Article shall govern the establishment of house of representa-

it unnecessary to discuss whether the 1992 plan was narrowly tailored to further a compelling state interest.[20]

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tives districts, *which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards.*

Ohio Const. art. XI, § 10. Thus, every time the Apportionment Board created a new house district pursuant to section 10 and disregarded a pre-existing house district that could have been retained pursuant to section 7(D), it violated the express language of the Ohio Constitution. To read the dissent's description of the redistricting process under Article XI, however, one would never realize that section 7(D) even existed. *See* Dissenting Op. App. A, ¶¶ 7-15.

Moreover, in describing the creation and numbering of House districts under section 10 of Article XI, the dissent claims that, pursuant to section 10(C), after districts are formed within a county having more than one whole ratio of representation, any remaining territory "must be combined with adjoining territory outside the county before proceeding to combine the remaining territory of the state into representative districts." Dissenting Op. App. A, ¶ 14. Clearly, however, section 10(C) does not mandate such a process. The Defendants interpreted section 10(C) in the same manner, and this "loose" interpretation greatly contributed to the resultant destruction of existing districts in other counties that could have and should have been retained pursuant to section 7(D) of Article XI.

As an aside, we note that our consideration of the last issue is not legally precluded by the Ohio Supreme Court's decision in *Voinovich v. Ferguson*, 586 N.E.2d 1020 (1992) (per curiam). Contrary to the dissent's conclusion, *see* Dissenting Op. App. A, ¶ 17, the Ohio Supreme Court did not hold that the entire redistricting plan complied with the requirements of Article XI of the Ohio Constitution. A careful reading of the court's brief per curiam opinion reveals that the court was only addressing the constitutionality of Senate District 32 in the redistricting plan. *See Ferguson*, 586 N.E.2d at 1021. The majority of the court did not address the constitutionality of a single House district in the proposed redistricting plan under the Ohio Constitution.

[20] We note, however, for instructional purposes that any redistricting plan that, for race-based remedial purposes, proposes to move black voters into a district that already has more than 35%

IV. Conclusion

The Fourteenth and Fifteenth Amndments to the United States Constitution, and the Voting Rights Act of 1965 have been major vehicles for the empowerment of black Americans long denied the full enjoyment of their political rghts. Over the years, various schemes and artifices have been dsigned to serve as impediments to the attainment of citiizenship status by minorities. As Justice Frankfurter, however, wrote for the Supreme Court in *Lane v. Wilson*, 307 U.S. 268, 275 (1939), "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Without characterizing the nature of the discrimination present here, we simply hold that Justice Frankfurter's admonition is equally applicable to the Equal Protection Clause of the Fourteenth Amndment. Using race to draw lines to concentrate black voters in discrete legislative districts with the reciprocal effect of siphoning off and reducing their influence in other districts, without legally cognizable justification, is incompatible with the Constitution, as now interpreted by the Supreme Court. Accordingly, we direct the State Defendants to redraft House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan to comply with the aforementioned principles.

In placing reliance on this court's and the Supreme Court's holdings that racial bloc voing had not occurred in Ohio's legislative elections, we make no judgment as

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black population, may have a difficult time passing the narrowly-tailored prong of strict scrutiny analysis. Statistical evidence in Ohio revealed that there was only one legislative district in the last twenty-five years that had more than 35% black population and did not elect a black candidate. *Quilter*, 1992 WL 677145, at *8 & n.5. Thus, currently in Ohio, 35% black population in a district is considered adequate to provide the black population with an equal opportunity to elect the candidate of its choice, since it has been shown that Ohio does not have a history of racially polarized voting in the state legislative districts at issue here. *Id.*

to the state of racial progress in other aspects of race relations in Ohio. The fact that black voters, however, in the various legislative districts, as shown by the record in this case, coalesce with white voters in significant enough numbers to elect candidates of their choice, who happened to be black, demonstrates a high degree of maturity. In our view, this degree of voter maturity represents the essence and ultimate objective of the Voting Rights Act and the Constitution. We must not, we dare not permit a retreat from this admirable advance in electoral politics by approving a plan such as this.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze, Sr.
ANTHONY J. CELEBREZZE, SR.
U.S. Circuit Judge

APPENDIX D

[Filed Apr. 28, 1995]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASERN DIVISION

Case No. 5: 91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

Judge Nathaniel R. Jones
Judge Anthony J. Celebrezze, Sr.
Judge David D. Dowd, Jr.

OPINION

The question before this court is whether the Ohio Apportionment Board's consideration of race in its 1992 redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment. We hold that by virtue of demonstrated white and African American coalitional voting for legislative seats in Ohio, and the failure of Defendants to demonstrate a compelling state interest in using race in drawing legislative lines, certain districts in the 1992 plan are unconstitutional.

I. Background and Procedural History

Pursuant to the Ohio Constitution, the State Apportionment Board, comprised of five members, must reapportion State House and Senate electoral districts for the state legislaure every ten years.[1] Following the 1990 federal census, a majority of the Apportionment Board [2] appointed James R. Tilling to draft an apportionment plan on behalf of the Board. After conducting public hearings throughout the state, including meeting with some members of minority organizations, Tilling drafted a plan that included eight majority-minority districts, districts in which a majority of the population is a member of a specific minority group. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1153 (1993). On October 1, 1991, the Apportionment Board adopted the plan Tilling submitted by a 3-2 vote along party lines. *Id.* The three Republican members voted for

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[1] Article XI, Section 1 of the Constitution of the State of Ohio provides:

> The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.
>
> Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year [1971] and every tenth year thereafter.

Ohio Const., art. XI, § 1.

[2] The majority consisted of Defendants George V. Voinovich, Governor of the State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and Robert A. Taft, II, Secretary of State of Ohio. In the minority were Plaintiffs Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, and Thomas E. Ferguson, Auditor of the State of Ohio.

the plan, and the two Democrats voted against it. The Board later reconvened on October 3, 1991, to make several technical amendments to the plan, and the plan, adopted on October 3, 1991, in the wake of these changes, was designated "Amendment C."

On November 1, 1991, Barney Quilter and Thomas Ferguson, the two Democrats on the Board who voted against the plan, and various Democratic party officials and legislators filed suit against the Republican members of the Apportionment Board and Tilling. Seeking invalidation of the plan, the Plaintiffs alleged that the redistricting plan violated section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amndments to the United States Constitution, and Article XI of the Ohio Constitution, which provided specific apportionment guidelines. *Voinovich v. Quilter*, 794 F. Supp. 695, 695-96 (N.D. Ohio 1992). According to the Plaintiffs, the Defendants intentionally "packed minorities into certain districts where minorities historically were able to elect representatives of choice with crossover votes." *Id.* at 698. The Plaintiffs contended that this packing resulted in a waste of minority votes in the packed districts and a dilution of minority voting strength in the surrounding areas where the "packed" voters could influence elections. *Id.* In response, the Defendants contended that the plan actually enhanced the strength of black voters by creating safe, minority-dominated districts. As justification for these changes, the Defendants cited compliance with the Voting Rights Act and federal case law, which allegedly mandated the drawing of majority-minority districts. *Id.*

On January 31, 1992, a majority of this three judge panel held that there was "no legal mandate or finding of a Voting Rights Act violation to justify Defendants' creation of majority-minority districts wherever possible in the 1991 apportionment plan." *Id.* at 701. Thus, we

ordered the Board to draft a new plan or demonstrate that it was remedying a section 2 violation.[3] *Id.* at 702.

The Apportionment Board responded by establishing and adopting a record on February 18, 1992, that, in its view, justified the Board's creation of minority-controlled state legislative districts. Furthermore at its February 18 meeting, the Board amended the 1991 plan to eliminate a series of technical errors in the plan that the Ohio Supreme Court had identified in its separate review of the plan, *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992). The resulting 1992 plan, "Amendment D," created only five majority-minority districts, however, a reduction from the eight majority-minority districts in the 1991 plan, "Amendment C."

On March 10, 1992, after the Board submitted its findings and conclusions, along with the new 1992 plan, this court held that the Board "fail[ed] once again to justify its wholesale creaiton of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965." *Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992). Furthermore, this court held that the 1992 plan also violated the Fifteenth Amendment of the United States Constitution. *Id.* Nine days later, in response to Defendants' motion for a stay of the March 10 order pending appeal to the United States Supreme Court, this court additionally held that both the 1991 and 1992 plans violated the Fourteenth Amendment because they departed from the requirement that all districts be of nearly equal population. *Quilter v. Voinovich*, No. 5:91CV-2219, 1992 WL 677145, at *10 (N.D. Ohio Mar. 19, 1992).

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[3] We declined to address the Plaintiffs' constitutional claims at this point because our analysis under the Voting Rights Act required the plan to be justified or revised. Likewise, because the Ohio Supreme Court, in *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992), was concurrently considering the Plaintiffs' claim under the Ohio Constitution, we abstained from addressing the pendant claim.

The Defendants appealed to the United States Supreme Court. In *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), the Supreme Court reversed this court's *Quilter* decisions. Denying two of the Plaintiffs' claims, the Court held that the reapportionment plan at issue did not violate section 2 of the Voting Rights Act, nor did it violate the Fifteenth Amendment to the United States Constitution. Nevertheless, the Court held that the Plaintiffs had established a *prima facie* case that the population deviations between the districts violated the Equal Protection Clause, and the Court remanded "only for further proceedings on whether the plan's deviation from equal population among districts violate[d] the Fourteenth Amendment." *Id.* at 1154.

Upon remand, we held that the Ohio reapportionment plan survived scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause because (1) the Defendants advanced a genuine, rational state policy to justify the deviations from population equality among the state legislative districts, (2) their plan reasonably furthered the rational state policy, and (3) the 13.81% and 10.54% total deviations fell within constitutional limits. *Quilter v. Voinovich*, 857 F. Supp. 579, 587 (N.D. Ohio 1994). Accordingly, judgment was entered for the Defendants on this issue.

While the latter decision was pending, however, the Plaintiffs moved this court for permission to amend their complaint in light of the Supreme Court's recent decision in *Shaw v. Reno*, 113 S. Ct. 2816 (1993). As a lower court, we are bound of course, regardless of the strength of our reservations,[4] to follow the Supreme Court's decision

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[4] We note that critics of the Court's decision in *Shaw* have raised compelling concerns with which we sympathize. *See* A. Leon Higginbotham, Jr., et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Review 1593 (1994); Brief of the Congressional Black Caucus as *Amicus Curiae* in Support of Appellants, *United States v. Hays*, Nos. 94-558/627 (U.S., *cert. granted* Dec. 12, 1995).

in *Reno*, where the Court held for the first time that a plaintiff could state a claim under the Equal Protection Clause by alleging that a districting plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 2828. We granted the Plaintiffs' motion, and their complaint was accordingly amended.[5] *Quilter v. Voinovich*, 157 F.R.D. 36, 40 (N.D. Ohio 1994).

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[5] The Plaintiffs' Second Amended Complaint revised the First Amended Complaint in only two respects. First, Count IV, entitled "Violation of the Equal Protection Clause—Segregation of Voters by Race Without Compelling Governmental Justification," is added. Second, the prayer for relief was accordingly revised. In pertinent part, Count IV alleges the following:

> 52. . . . The reapportionment plan adopted by the Defendants on February 18, 1992 intentionally separated Ohio voters on the basis of race without regard for the traditional redistricting principles set forth in the Ohio Constitution and otherwise without any compelling governmental justification. To justify the creation of race-based districts in the urban centers of Ohio, Defendants asserted that there was widespread racial bloc voting throughout Ohio. The trial court specifically found, and the Supreme Court of the United States confirmed, that Ohio did not suffer from legally cognizable racially polarized voting. . . .
>
> 53. The Defendants deliberately created race-based legislative districts in urban centers initially and then used the purported, but sham, necessity of creating such districts as the basis for ignoring the traditional anti-gerrymandering provisions of the Ohio Constitution throughout the state of Ohio. Absent the ripple effect of the racial gerrymandering in the urban centers of the state of Ohio, the Defendants would not have been forced to ignore on a wholesale basis the directives of Article XI, Section 7, of the Ohio Constitution to follow existing political and legislative boundaries wherever possible.
>
> 54. . . . The decision to abandon the traditional districting mandates contained within the Ohio Constitution is neither

Having considered the record evidence and the arguments of the parties, both written and oral, we are prepared to issue our decision.[6] We preface our findings of fact and conclusions of law, however, with a discussion of the governing law that provides the analytical paradigm for our conclusions.

II. First Principles

A. Nature of a Shaw v. Reno *Claim*

Prior to the Supreme Court's decision in *Reno*, the Court had delineated only two legal theories to support a redistricting challenge under the Equal Protection Clause of the Fourteenth Amendment: (1) violation of the "one-person-one-vote" principle, which requires that districts be equal in population so that the votes cast by voters in one district do not have less weight than those cast by voters in other districts, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); and (2) a claim of vote dilution, whereby dis-

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compelled by the doctrine of federal supremacy, nor based on any lawful, organized, or rational districting criteria. . . .

55. The Defendants have articulated no compelling governmental interest for the wholesale abandonment of the provisions of the Ohio Constitution. As a result, the Defendants have drawn irregular districts in numerous places throughout the state, districts which have no explanation other than the ripple effects caused by the racially drawn districts in the urban centers. In some instances, the racially drawn districts themselves have irregular shapes not required by the Ohio Constitution.

56. The districts which have been modified solely on the basis of race include House Districts 31, 30, 22, 21, 38, 39, 44, and 49. No evidence has been presented to the trial court that either legally cognizable remedial action was necessary to draw these racially gerrymandered districts, or that the creation of such districts was narrowly tailored to further any compelling governmental need.

Pls.' Second Am. Compl. ¶¶ 52-56.

[6] The court also appreciated and considered an *amicus* brief submitted by the United States Department of Justice, which supported the position of the Defendants.

tricts are purposefully drawn to unfairly dilute or diminish the voting strength of an identified group of voters, *Rodgers v. Lodge*, 458 U.S. 613 (1982). *Shaw v. Hunt*, 861 F. Supp. 408, 421 (E.D.N.C. 1994), *petition for cert. filed*, 63 U.S.L.W. 3439 (U.S. Nov. 21, 1994) (No. 94-923); *see also Reno*, 113 S. Ct. at 2822, 2823, 2828. Under both theories, the Court found that redistricting schemes violated the Equal Protection Clause of the Fourteenth Amendment only when they caused *material harm* to the voting strength of an identifiable group of citizens. *Hunt*, 861 F. Supp. at 422; *see, e.g., Rodgers v. Lodge*, 458 U.S. 613, 616-17 (1982) (noting that redistricting plan violates Fourteenth Amendment when it is adopted with a discriminatory *purpose* and has *effect* of diluting minority voting strength). The Supreme Court had never held that a plaintiff could challenge a redistricting plan solely because it impermissibly took race into account in drawing district lines; the Court had required not only a showing of discriminatory purpose but also specific discriminatory effect, a concrete material harm, to state a valid claim under the Fourteenth Amndment.

In *Shaw v. Reno,* however, the Court announced a third means to challenge legislative redistricting under the Equal Protection Clause. The Court held that "a plaintiff challenging a reapportionment [plan] under the Equal Protection Clause may state a claim by alleging that the [plan], though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 113 S. Ct. at 2828. In essence, the Court was saying that a plaintiff no longer had to allege discriminatory effect or material harm in conjunction with discriminatory purpose to state a valid equal protection claim, if the redistricting plan contained districts, whose composition rationally could be understood only as a deliberate effort to segregate voters on the basis of race—a racial gerrymander, *id.* at 2823 (defining a racial gerrymander as the deliberate and

arbitrary distortion of district boundaries for racial purposes).

The Court declared that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free pople whose instituions are founded upon the doctrine of equality.' " *Id.* at 2824 (citing *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943)). "They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), and they "may serve to stimulate our society's latent race-consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs," *United Jewish Organizations v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part).

Because a racial gerrymander is just as invidious as any other law that classifies people on the basis of their race, the Court in *Reno* held that race-based redistricting demands the same level of scrutiny, that is, strict scrutiny: a race-based redistricting plan can be upheld only if it is narrowly tailored to further a compelling state interest. 113 S. Ct. at 2825, 2826, 2830; *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (noting that strict scrutiny applies not only to legislation that contains explicit racial classification but also to those "rare" statutes that are "unexplainable on grounds other than race," even though they are race-neutral on their face). Consistent with prior practice, the Court made clear that because a racial gerrymander is a racial classification, it must be reviewed with strict scrutiny even if the drafters of the redistricting plan claim that the plan was drawn with the "benign" purpose of enhancing minority voting strength, 113 S. Ct. at 2830 ("Equal Protection Clause demands strict scrutiny of all racial classifications . . . because without it, a court cannot determine whether or not the discrimination truly is "benign."); *id.* at 2826 ("[D]istrict lines obviously drawn

for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption."), or claim that the racial gerrymander benefits or burdens the races equally, *id.* at 2829 (citing *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 1370 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.").

We believe that the Court's decision in *Reno* to apply strict scrutiny to a race-based apportionment plan is congruous with the Court's Equal Protection Clause analysis in other contexts where the use of racial classifications has been justified as a remedial measure or affirmative action. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (government contracting and minority set-asides); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (public employment); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (admission to public medical school). As such, *Reno* is applicable to this case because the evidence reveals that the Defendants drew certain districts in the 1992 plan to enhance the voting strength of minority voters, ostensibly with remedial purposes in mind. *See* discussion *infra* part III; *see also* Defs.' Post Trial Br. at 60 (stating that if this court finds strict scrutiny should be applied to the 1992 plan, the Apportionment Board had enough evidence to conclude that *remedial* action was necessary to comply with section 2 of the Voting Rights Act).

Although the Court in *Reno* clearly created a new means to challenge state apportionment plans pursuant to the Fourteenth Amendment, its analysis left many unanswered questions that are integral to the proper resolution of a *Shaw v. Reno* claim: (1) To what extent must "race" be a factor in an apportionment plan before the plan becomes a racial gerrymander subject strict scrutiny analysis?; (2) Is circumstantial evidence of "bizarre" district shapes necessary to state and sustain a *Shaw v.*

Reno claim?; (3) Once strict scrutiny is triggered, who has the burden of proof in a *Reno* claim?; (4) What constitutes a "compelling state interest" that would justify race-based redistricting?; and (5) What is the meaning of "narrowly tailored" in the redistricting context? We turn now to consider these issues.

B. The Trigger for Strict Scrutiny

The Court in *Reno* did not specify the threshold showing of racial consideration that was necessary to establish that a redistricting plan was a racial gerrymander, subject to strict scrutiny. The Court did, however, narrow the spectrum by significantly reiterating the principle that "awareness" of race or "race consciousness" in the districting process is not equivalent to a racial gerrymander that requires strict scrutiny analysis:

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.

113 S. Ct. at 2826 (emphasis in original). This proposition is not novel, however, because the Court's equal protection cases "have long recognized that there is a critical distinction between 'race-conscious' action and 'race-based' action, and that the 'intentional' use of race required to trigger strict scrutiny of legislative action cannot be established simply by showing that the legislature adopted a particular course of action with knowledge that it was likely to have a particular racial impact. *Hunt*, 861 F. Supp. at 433 (citing *Personnel Adm. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (noting that the sort of "discriminatory purpose" required to trigger strict scrutiny of a statute that is facially race-neutral "implies more than intent as volition or intent as awareness of conse-

quences"; it necessitates evidence revealing "that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its . . . effects upon an identifiable group")). Thus, in the redistricting context, the level of racial consideration or racial intent that is necessary to trigger strict scrutiny under *Reno* is more than "just taking action with the knowledge or awareness that it is likely to have a particular racial impact, but taking it with the *specific intent* to bring about such an impact." *Id.*; *Reno*, 113 S. Ct. at 2823 (noting that a racial gerrymander is "the *deliberate* and arbitrary distortion of district boundaries . . . for [*racial*] *purposes*") (emphasis added)).

Because we believe that the Supreme Court in *Reno* "intended to place race-based redistricting legislation into the same category as all other forms of race-based state action after *Croson*, for purposes of analysis under the Equal Protection Clause," *Hunt*, 861 F. Supp. at 429, we find that strict scrutiny of a redistricting plan is now triggered if "racial considerations played a 'substantial' or 'motivating' role in the line drawing process, even if they were not the only factor that influenced that process," *id.* at 431, and even if the state's use of race "can be said to have a 'benign' or 'remedial' purpose," *id.* at 431. *See Hays v. Louisiana*, 839 F. Supp. 1188, 1202, 1214, 1216 (W.D. La. 1993) ("*Hays I*") (majority and concurring opinion), *vacated and remanded for reconsideration due to change in law*, 114 S.Ct. 2731 (1994), *on remand*, *Hays v. Louisiana*, 862 F. Supp. 119 (W.D. La. 1994) ("*Hays II*"), *cert. granted sub nom., United States v. Hays*, 115 S. Ct. 687 (1994); *see also Arlington Heights*, 429 U.S. at 265-66 ("When there is proof that a discriminatory purpose has been a motivating fatcor in the decision, . . . judicial deference is no longer justified."). The *Hunt* court described the level of racial consideration necessary to trigger strict scrutiny as follows:

> This "race-a-motivating-factor" triggering test is necessarily met by proof that the plan's lines were deliberately drawn so as to create one or more districts in which a particular racial group is a majority, even if factors other than race are shown to have played a significant role in the precise location and shape of those districts. If the line drawing process is shown to have been infected by such a deliberate racial purpose, strict scrutiny cannot be avoided simply by demonstrating that the shape and location of the districts can rationally be explained by reference to some districting principle other than race, for the intentional classification of voters by race, though perhaps disguised, is still likely to reflect the "impermissible racial stereotypes," *Shaw*, —— U.S. at ——, 113 S. Ct. at 2827, " 'illegitimate notions of racial inferiority' " and " 'simple racial politics,' " *id.* at ——, 113 S. Ct. at 2824, that strict scrutiny is designed to " 'smoke out.' " *Croson*, 488 U.S. at 493.

Hunt, 861 F. Supp. at 431-32.

This understanding of the level of racial intent needed to trigger strict scrutiny analysis in the redistricting context is the obvious implication of the *Reno* Court's adoption of the equal protection principles delinerated in *Croson*, *Wygant*, and *Arlington Heights*, *see Reno*, 113 S. Ct. at 2824, 2825, 2829, 2830, 2831, 2832, and it is consistent with them. *Hunt*, 861 F. Supp. at 432 & n.19; *see also* T. Alexander Alienikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 Mich. L. Rev. 588, 643-49 (1993) (discussing *Reno* Court's importation of *Croson's* equal protection analysis, which "now serves as the paradigmatic case for equal protection analysis," to the redistricting context).

Before leaving this issue, we note that some courts that have addressed this question since the advent of *Reno*,

have reached different conclusions regarding the level of racial consideration that is necessary to trigger strict scrutiny in the redistricting context. Some have concluded that race must be the sole motivation behind a particular district shape before strict scrutiny is appropriate. *See Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 278 (2d Cir. 1994) (finding that lower court order did not transgress *Reno* because "it did not instruct the City Council to redistrict *solely* on racial grounds") (emphasis added), *cert. granted and judgment vacated and remanded*, 115 S. Ct. 35 (1994); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) (stating that *Reno* held "when districts are drawn in such an extremely irregular fashion as to be unexplainable, other than being based *solely* on race, a claim under Equal Protection Clause for racial gerrymandering can be stated") (emphasis added), *petition for cert. filed*, 63 U.S.L.W. 3127 (U.S. Aug. 8, 1994) (No. 94-275). This interpretation presents the attractiveness of being a very literal rendering of *Reno's* emphasis that strict scrutiny should be applied to districts that are so irregular on their face that they "rationally cannot be understood *as anything other* than an effort to 'segregat[e] . . . voters on the basis of race.' " 113 S. Ct. at 2826 (emphasis added). Nevertheless, we agree with the *Hunt* court that this interpretation of *Reno* cannot be correct.

> If [*Reno*] meant no more than the state says it does, it would have precious little practical effect on race based districting, for it would require states to defend the deliberate creation of majority-minority districts under strict scrutiny *only* when they could not come up with any rational explanation for the location and shape of those districts other than race. This would seldom be the case, given the wide variety of other districting principles that may be used to justify even the most peculiar-looking districts.

Hunt, 861 F. Supp. at 429.

The Defendants propose that we adopt the triggering test of another court, which has determined that under *Reno* redistricting plans should be subjected to strict scrutiny analysis only when race is the "predominant" factor in the redistricting process. Defs.' Post Trial Br. at 55-56 (citing *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *stay granted*, 115 S. Ct. 36 (1994), *probable jurisdiction noted*, 115 S. Ct. 713 (1995)). The *Johnson* court describes it [sic] position as follows:

> [I]n order to invoke strict scrutiny, it must be shown that race was the substantial or motivating consideration in creation of the district in question. That term requires that the legislature (a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was the overriding, predominant force determining the lines of the district. If race, however deliberately used, was one factor among many of equal or greater significance to the drafters, the plan is not a racial gerrymander/racial classification subject to strict scrutiny.

Johnson, 864 F. Supp. at 1372. The *Johnson* court expressly crafted this position "to completely remove from constitutional suspicion" those redistricting plans that were well drafted with the specific racial purpose of complying with the Voting Rights Act. *Id.* The *Johnson* court was concerned that following the *Hunt* court "race-a-motivating-factor" triggering test would virtually insure long and protracted litigation for the states every time a state rightfully considers the Voting Rights Act in its redistricting process. *Id.* at 1373. The *Johnson* court was "reluctant to conclude that the Supreme Court intended [in *Reno* for] voting rights litigation to sweep the country at ten-year intervals." *Id.*

Although, we agree with the *Johnson* court that the *Hunt* and *Hays I* courts' "race-a-motivating-factor" trigger-

ing test will theoretically subject all redistricting plans that exhibit racial intent to strict scrutiny analysis, including plans that are drawn with the racial purpose of complying with the Voting Rights Act, *see Hunt*, 861 F. Supp. at 433, we decline the ideological invitation to interpret the Constitution based on the prospects of increased litigation. Any developing legal context, like the arena of legislative redistricting, is bound to produce litigation regardless of the theories that are proposed and adopted.

Instead, we have adopted the "race-a-motivating-factor" triggering test because we find it is consistent with the Supreme Court's equal protection analysis in other contexts. We believe that both the "race-the-only-factor" and the "race-the-predominant-factor" triggering tests are expressly foreign to the Court's equal protection jurisprudence. As the Court noted in *Arlington Heights*:

> *Davis* does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated *solely* by a single concern, or even that a particular purpose was the *"dominant"* or *"primary"* one. . . . When there is a proof that a discriminatory purpose has been *a motivating factor* in the decision, . . . judicial deference is no longer justified.

429 U.S. at 265-66.

State redistricting plans that rightfully consider and apply the mandates of the Voting Rights Act, if challenged under the Equal Protection Clause, likely will incur strict scrutiny under the triggering test that we have adopted, but they will not be condemned automatically to constitutional invalidity. As Justice Powell's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (public higher education) demonstrated, although strict scrutiny may limit the ability of state actors to take race-based

remedial action, it does not have to be "strict in theory, fatal in fact," *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring); *see also* Aleinikoff & Issacharoff, *supra*, at 643-45 (arguing that *Reno*, instead of *Crosonizing* reapportionment law will ultimately be understood to have *Bakked* it). So long as a state is careful to narrowly tailor it redistricting plan to meet a compelling state interest, which can include compliance with the Voting Rights Act, the redistricting plan will survive strict scrutiny.

C. Bizarre District Shapes: A Necessary Element?

Relying on *Reno*, the Defendants contend that strict scrutiny is not required in this case because "Plaintiffs have not established that any of the districts in [the 1992 plan] are 'bizarre' or 'irregular.'" Defs.' Post Trial Br. at 55. This raises the question of whether the presence of bizarre district shapes is a necessary element to trigger strict scrutiny in a *Shaw v. Reno* claim.

Undeniably, the Court in *Reno* emphasized that the new cause of action under the Fourteenth Amendment was based on the presence of districts whose shapes were so irregular or bizarre that they rationally could not be understood as anything other than an effort to segregate voters on the basis of race. 113 S. Ct. at 2828, 2832. Such districts, however, do not draw close constitutional review simply because of their irregular shape. Adherence to traditional districting principles, such as compactness, contiguity, and respect for political subdivisions, is not a constitutional requirement. *Id.* at 2827 (citing *Gaffney v. Cummings*, 412 U.S. 735, 752 & n.18 (1973)). Rather, bizarre-shaped districts demand strict scrutiny because their shape is circumstantial evidence that race has been a purposeful factor in their creation. *See Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring) ("One need not use Justice Stewart's classic definition of obscenity—'I know it when I see it'—as an ultimate stand-

ard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation." (footnotes omitted)). Logically, therefore, the Supreme Court's use of a district's shape as circumstantial evidence of racial intent implies that proof can be made "by any means, including state concession, bizarre shape, or some combination of the various factors typically used to prove the 'intent' element of an equal protection claim under *Arlington Heights.*" *Hunt*, 861 F. Supp. at 431; *see Arlington Heights*, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."). Virtually all the courts that have addressed this matter are in agreement with this conclusion. *See Johnson*, 864 F. Supp. at 1374 ("The Supreme Court's use of a district's shape as circumstantial evidence of legislative intent implies that proof might be made by other means. . . . This is clearly the correct approach."); *Hays I*, 839 F. Supp. at 1195 ("If everyone—or nearly everyone—involved in the design and passage of a redistricting plan asserts or concedes that design of the plan was driven by race, then racial gerrymandering may be found without resorting to the inferential approach aproved by the Court in *Shaw*."). Thus, regardless of whether the evidence is direct or circumstantial or whether bizarre district shapes are present or not, if the evidence indicates that race was a substantial or motivating factor in the apportionment plan, then a *Shaw v. Reno* claim is stated and strict scrutiny analysis is required.

D. Burden of Proof

The parties agree that the Plaintiffs in this equal protection challenge bear the ultimate burden of persuasion throughout the proceeding. *See Batson v. Kentucky*, 476 U.S. 79, 93-94 & n.18 (1986); *Wygant*, 476 U.S. at 277-

78. If the Plaintiffs offer proof that the redistricting plan is race-based, then this gives rise to a presumption that the plan is unconstitutional, and the burden shifts to the Defendants to demonstrate that their use of race was narrowly tailored to meet a compelling state interest. *See Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436. Yet, the Defendants' shifted burden is one of production only, not persuasion. The Plaintiffs still bear the ultimate burden of persuading the court that the Defendants did not have a compelling state interest that justified their use of race in apportionment process or that the Defendants' redistricting plan was not narrowly tailored to meet such an interest. *See Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring); *Hunt*, 861 F. Supp. at 436.

E. Compelling State Interest

Next, we consider those reasons that might serve as a compelling state interest, justifying a state's decision to engage in race-based redistricting. At this point, we are not concerned with whether the Defendants had a compelling justification for their consideration of race in the 1992 plan; we are concerned with whether the Defendants had a compelling justification for *any* redistricting plan that considered race as a substantial or motivating factor. The question of "whether the particular plan under challenge takes race into account to a greater degree than necessary to further a compelling state interest is a question for the 'narrowly tailored' prong of the strict scrutiny analysis, which examines the 'fit' between the compelling state interest and the precise means chosen by the state to accomplish it." *Hunt*, 861 F. Supp. at 437 (citing *Wygant*, 476 U.S. at 280 & n.6, and *Fullilove*, 448 U.S. at 507 (Powell, J., concurring)). Without presenting an exhaustive review of those reasons that theoretically might serve as a compelling state interest in the redistricting context, we have chosen to limit our discussion to the compelling interest that the Defendants have offered in this case—compliance

with section 2 of the Voting Rights Act. Defs.' Post Trial Br. at 57-63.

In *Shaw v. Reno*, the state argued that compliance with the Voting Rights Act was a compelling state interest. 113 S. Ct. at 2830. The Court, however, stopped short of totally endorsing this claim: "The states certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid is interpreted and as applied." *Id.* Obviously, the Court is aware that in strict scrutiny parlance a "compelling state interest" is a term of art. Thus, we do not think the Court's choice of the words "very strong interest" is insignificant. It suggests to us that the Votinug Rights Act may serve as a compelling state interest in some circumstances, but in others, state action in conformity therewith may violate the Equal Protection Clause of the Fourteenth Amendment. *See Johnson*, 864 F. Supp. at 1381; *see also Johnson v. De Grandy*, 114 S. Ct. 2647, 2666-67 (1994) (Kennedy, J., concurring) ("Given our decision in *Shaw*, there is good reason for state and federal officials with responsibilities related to redistricting [that are engaging in remedial action pursuant to section 2 of the Voting Rights Act], as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause.").

Previously, the Court has recognized a state's compelling interest in taking race-based remedial measures to eradicate the effects of past racial discrimination. *Reno*, 113 St. Ct. at 2831 (citing *Croson*, 488 U.S. at 491-93; *Wygant*, 476 U.S. at 280-82). Furthermore, the Court has recognized that this interest extends to remedying past or present violations of federal statutes that were intended to eliminate discrimination in specific aspects of life. *See Croson*, 488 U.S. at 500 ("constitutional or statutory violation"); *Wygant*, 476 U.S. at 289 (O'Connor, J., con-

curring) ("violation of federal statutory or constitutional requirements"). Moreover, the Court has clarified that a state does not have to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was necessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277); *Hunt*, 861 F. Supp. at 437.

Applying these principles to the redistricting context and the Voting Rights Act, the *Hunt* court developed a very useful standard by which to determine when the Voting Rights Act can serve as a compelling state interest:

> Under these principles, we think it clear that a state has a "compelling" interest in engaging in race-based redistricting to give effect to minority voting strength whenever it has a "strong basis in evidence" for concluding that such action is "necessary" to prevent its electoral districting scheme from violating the Voting Rights Act.
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> . . . .
>
> A state has a "strong basis in evidence" for concluding that it must engage in race-based redistricting in order to comply with the Voting Rights Act when it has information sufficient to support *prima facie* showing that its failure to do so would violate the Act. *See Croson*, 488 U.S. at 500 (majority) (evidence "approaching a prima facie case of a constitutional or statutory violation").

Hunt, 861 F. Supp. at 437-439; *see Johnson*, 864 F. Supp. at 1381; *Hays I*, 839 F. Supp. at 1217 (Walter, J., concurring).

Generally, to establish a prima facie case that a single-member redistricting plan violates section 2 of the Voting Rights Act, a plaintiff must show three things, the *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))); *Johnson*, 864 F. Supp. at 1387; *Hunt*, 861 F. Supp. at 440. Thus, when a state has reliable information that indicates the relevant minority group could establish a prima facie challenge to the existing districting plan under section 2 of the Voting Rights Act, then it has a "strong basis in evidence" for concluding that it must engage in race-based redistricting to comply with section 2 of the Voting Rights Act, and it has established a "compelling interest" for the remedial measures. *Hunt*, 861 F. Supp. at 440; *see Hays I*, 839 F. Supp. at 1217 (Walter, J., concurring).

F. Narrowly Tailored

Finally, we consider how to determine whether a racial gerrymander, if justified by a compelling state interest, is narrowly tailored to further that interest. The Court provided little help with this issue in *Reno*, other than to say that in the context of a challenge under section 5 of the Voting Rights Act, "[a] reapportionment plan would not be narrowly tailored if the State went beyond what was reasonably necessary to avoid retrogression." Therefore, we agree with the *Hunt* and *Hays I* courts that the best analytical approach is to examine the Court's decisions that apply the narrowly tailored standard in other race-based remedial contexts. *See Hunt*, 861 F. Supp. at 444-45; *Hays I*, 839 F. Supp. at 1206-09, 1215 (majority and concurring opinions).

In other race-based contexts, the Court has examined five factors to determine whether a race-based affirmative action plan is narrowly tailored to serve the compelling state interest in remedying the discrimination: (1) the efficacy of alternative remedies that were less race-based or race-neutral; (2) whether the plan utilizes a fixed racial quota or a flexible racial goal; (3) the duration of the plan; (4) the relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates; and (5) the impact of the plan on the rights of third parties. *See United States v. Paradise*, 480 U.S. 149, 171-85 (1987) (plurality); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 485-89 (1986) (Powell, J., concurring); *see also Croson*, 488 U.S. at 507-08; *Wygant*, 476 U.S. at 279-84. Although thse criteria were developed in contexts other than race-based redistricting, we think they are easily adapted to this context. While we have engaged in a rigorous analysis, our inquiry has been careful and sensitive.

Considering the first factor, a court must decide whether the state could have accomplished its compelling interest by some means that was less race-based or race-neutral. *Wygant*, 476 U.S. at 280 n.6. If compliance with the Voting Rights Act is a state's compelling interest then, obviously, a race-neutral alternative does not exist. Assuming race must be considered to comply with the Voting Rights Act, the question then becomes whether a state could have complied with the Voting Rights Act with means that were less race-based. The Plaintiffs in this case do not allege that the Apportionment Board created more majority-minority districts than is reasonably necessary to comply with the Voting Rights Act. Rather, they generally claim that the Board packed black voters into districts to comprise less than a majority, where a black minority population, in conjunction with significant white crossover votes, already had ample opportunity to

elect the candidate of its choice without the addition of the black voters. This packing of black voters into districts where they were not needed allegedly resulted in a waste of black votes in the "packed" districts and a loss of minority "influence" in those districts where the black voters were previously located. Assuming *arguendo* that such race-based measures truly further compliance with section 2 of the Voting Rights Act, the analytical question becomes a two-fold concern: whether the 1992 plan creates more "packed" districts than is reasonably necessary to comply with the Act and whether the "packed" districts it creates contain substantially larger concentrations of minority voters than is reasonably necessary to give minority voters a realistic opportunity to elect representatives of their choice in those districts. *See Hunt*, 861 F. Supp. at 446; *Hays I*, 839 F. Supp. at 1206-08.

Regarding the second factor, a court must determine whether the challenged plan requires a fixed racial quota that is crafted to achieve a racial balance or requires a flexible goal to be used as a standard in gauging the state's efforts at eradicating the discrimination in question. *See Sheet Metal Workers*, 478 U.S. at 477-78. We agree with the *Hunt* court that racial gerrymanders will "seldom be invalid on this ground" because they do not impose a fixed racial quota. 861 F. Supp. at 446. Even if a state creates a certain number of districts that are designed to elect minority representatives, there is no guarantee that minority representatives will be elected. Thus, such districts can hardly be viewed as anything other than examples of an acceptable, flexible goal for minority representation. *See Sheet Metal Workers*, 478 U.S. at 487-88.

The third factor invokes consideration of the planned duration of the remedial measure. If it is not a temporary provision, it may last longer than reasonably necessary to eliminate the effects of the targeted discrimination. *See id.* at 479 (noting that a temporary race-based remedial measure is acceptable because it "will end as soon

as . . . it is no longer needed to remedy past discrimination"). A race-based redistricting plan in Ohio will likely satisfy this test because the State is required, as a practical matter, to redistrict after each decennial census, and this will result in re-consideration and possible termination of the previous race-based plan.

The fourth factor requires the court to consider whether the remedial plan presents a reasonable relationship between the plan's goal for minority representation in the pool of applicants selected to receive the affirmative action and the percentage of minorities in the relevant pool of eligible candidates. As applied to the redistricting context, we think this requirement is satisfied so long as the percentage of racially-packed districts does not substantially exceed the percentage of minority voters throughout the state. *See Johnson v. De Grandy*, 114 S. Ct. at 2658 & n.11 (noting that ultimate right of section 2 of Voting Rights Act is minority voters' equal opporttunity to elect candidate of their choice, as measured by proportionality between percentage of majority-minority voting districts in state to minority members' share of the relevant population throughout the state).

The fifth factor requires a court to consider whether the challenged plan "impose[s] an unacceptable burden on innocent third parties." *Paradise*, 480 U.S. at 182. As applied to the redistricting context, we agree with the *Hunt* and *Hays I* courts that "a race-based redistricting plan imposes an unacceptable burden upon third parties, [and] hence is not sufficiently 'narrowly tailored' to survive constitutional muster, if it fails to comply with redistricting principles that are themselves constitutionally mandated, like the 'one person, one vote' standard and the prohibition against undue dilution of the voting strength of any identifiable group of voters." *Hunt*, 861 F. Supp. at 449; *see Hays I*, 839 F. Supp. at 1208. Like the *Hunt* court, however, we do not think that a racial gerrymander imposes an unacceptable burden on third parties simply

because the redistricting plan has a bizarre shape or deviates from traditional districting principles, which, themselves, are not constitutionally mandated.[7] *Hunt*, 861 F. Supp. at 449-56.

At this point we note that it is important for all the issues presented in this case to be analyzed in a way that gives expression to the constitutionally and statutorily based national goal of protecting the rights of persons victimized by historic discrimination, so that they may effectively participate in changing public policies to "ensure nondiscrimination and fair opportunities in education, employment, housing, and other areas." Arthur A. Baer & Pamela S. Karlan, *Voting Rights Act Enforcement: An Agenda for Equal Electoral Opportunity, in New Challenges, The Civil Rights Record of the Clinton Administration Mid-term* 169 (Report of the Citizen's Commission on Civil Rights, 1995).

Court decisions of today must be mindful of the Supreme Court's admonition over one hundred years ago in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), that the right to vote is a "fundamental political right, because preservative of all rights." The unanswered questions in *Shaw v. Reno* must not be responded to in such a way as to gut the Voting Rights Act's promise of equal electoral opportunity. When minority voters are packed into a district where they are unnecessary to the election of the minority's candidate of choice, who is capable of "changing public policies," such a plan must be justified by a com-

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[7] Consider the words of Chief Justice arren [sic] Burger in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), where the Court considered and approved the use of race-sensitive remedies to combat segregated schools. "The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations; and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system." *Id.* at 28.

pelling governmental purpose. This is particularly true when the effect of such a scheme is likely to be to reduce the opportunity for minority voters to coalesce with other voters to influence the election of candidates of their choice in the districts from which they are drawn. When this occurs the very spirit of the Voting Rights Act is eroded. The risk has prompted us to reject portions of the 1992 plan at issue here.

III. Findgs of Fact and Conclusions of Law

Based on our review of the evidence submitted by both parties, we find, for the following reasons, that race was a substantial and motivating factor in the Defendants' 1992 apportionment plan:

1. The Plaintiffs claims of racial gerrymandering are somewhat unusual in this case. First, they allege that the Defendants drew race-based legislative districts in the urban areas of Ohio and that this decision had the ripple effect of causing irregular shaped districts throughout the State, which violated the traditional districting principles embodied in the Ohio Constitution, particularly Article XI, § 7. Pls.' Second Am. Compl. ¶ 55. In addition, the Plaintiffs alleged that some of the race-based districts, themselves, had irregular shapes in violation of the traditional districting principles contained in the Ohio Constitution. *Id.* Finally, the Plaintiffs alleged that the racially gerrymandered districts "included" House districts 31, 30, 22, 21, 38, 39, 44, and 49. *Id.* ¶ 56. The Defendants contend that the Plaintiffs are limited to challenging only these eight districts, which were identified in their complaint. The Defendants, however, mischaracterize the Plaintiffs' complaint. The word "included" clearly is not an exclusive term. Thus, the eight districts identified in the complaint were illustrative of the alleged race-based districts but not

necessarily an exclusive listing of them. That said, however, we note that we are not concerned with districts whose irregular shape may have been the ripple effect of another district that was racially gerrymandered. Such an irregular district may indeed violate proscriptions of the Ohio Constitution, but the focus of a *Shaw v. Reno* claim is racial gerrymandering in violation of the Fourteenth Amendment to the United States Constitution. Thus, we are only concerned in this case with districts that allegedly have been racially gerrymandered.

2. The Defendants admittedly considered race when drafting their 1992 apportionment plan. The apportionment Board instructed Tilling to "draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act," and Tilling attempted to comply. Hr'g Tr. at 208. Tilling considered race to avoid dilution of minority voting strength in violation of the Voting Rights Act. *Id.* at 308.

3. Before Tilling drafted an apportionment plan, he attended public hearings throughout the state. At these hearings the Apportionment Board heard testimony from some members of the minority community requesting the Board to enhance minority voting strength by creating more majority-minority districts. Defendants' Post-Trial Br. at 2-3. At these hearings, Tilling publicly stated that consideration of and compliance with the Voting Rights Act was an important principle guiding the apportionment process. *Id.* at 3-5.

4. The Apportionment Board's Findings and Conclusions, adopted on February 18, 1992,[8] in support of

[8] The Apportionment Board has not met since Febraury 18, 1992, either to change or modify its findings regarding the 1992

the 1992 plan, also reveal that race was a substantial and motivating factor in the apportionment process. Based on the conclusions that the Voting Rights Act protected classes of voters, not incumbents, *see, e.g.*, Bd. Findings ¶¶ 177, 183, and that racial bloc voting existed throughout the State of Ohio, including districts containing minority voters, *id.* ¶¶ 124, 167, the Apportionment Board decided that it needed to create districts that would contain sufficient black population to guarantee the election of any new (non-incumbent) black candidate. Thus, the Board through Tilling added black voters to minority districts outside of Cuyahoga County because "there [wa]s insufficient black population in the minority districts to guarantee the election of a black candidate particularly given levels of voter turnout and racial bloc voting in the district." *Id.* ¶ 168. Obviously, one of the working assumptions in this process was that black voters would choose a black candidate as their representative.

5. The Board's analysis of incumbency elections in minority districts for 1984, 1986, 1988, and 1990, revealed an incumbency advantage of six to ten percent, *id.* ¶ 171, 173, and the Board concluded that it was unreasonable to configure districts based on the current incumbent because the successful incumbents might retire, die, or move on to other political positions during the 90's, *id.* at 172. *See also* Bd. Conclusion of Law ¶ 9 ("It is unreasonable to reconfigure minority districts based on the electoral success of minority incumbents. Further, such reconfiguration will result in impermissible minority vote dilution. Consideration of factors such as racial bloc voting, voter turnout, population shifts, demographics, in-

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plan. Thus, these findings constitute direct evidence of the Apportionment Board's rationale and justification for the 1992 plan.

cumbency factors, voting patterns and other such factors require that minority districts outside Cuyahoga County must reflect increased relative percentages of black voting age population.") Accordingly, the Board determined that "unless Black Voting Age Population margins are adopted in minority districts, minorities risk losing minority districts." Bd. Findings ¶ 174.

6. In Franklin County, the Board drew district lines to enhance the possibility of electing a new black candidate. Board Finding 189 indicates that Tilling "reconfigured House districts 29 and 31 in Franklin County to protect minority voters in those districts and to create a minority Senate District in Franklin County where none previously existed." *Id.* ¶ 189. Tilling testified that the incumbent black legislators, Reps. Miller and Beatty, had indicated a desire to run for different offices, and because the Voting Rights Act protects classes of voters and not incumbents, black voters were added to the districts of Reps. Miller and Beatty to achieve this goal. *Id.* ¶ 189. The percentage of black population in Rep. Miller's district, H.D. 22 under the 1992 plan, was increased from 38.50% to 44.68%, a 6.18% increase, which is within the 6-10% standard that would be necessary to compensate for the possible loss of incumbency advantage. Defs.' Supp. Exs., Vol. 1, Ex. DD. Likewise, the black population in Rep. Beatty's district, H.D. 21 under the 1992 plan, was increased from 46.80% to 54.30%, an increase of 7.50%. *Id.* Both Miller and Beatty previously had been elected to six and seven terms, respectively, Bd. Findings ¶ 162, by pluralities of better than two-to-one.

7. In Lucas County, the Board drew lines to enhance the possibility of electing a new black candidate. Tilling stated that he drew the districts in Lucas

County "to protect a class of voters, not the particular incumbent in that situation." *Id.* ¶ 177. Tilling added additional minority votes to Rep. Casey Jones' district H.D. 49 under the 1992 plan, "not because Casey Jones needed them but because down the road in this decade whoever is his successor needs the opportunity to give minorities a clear chance to elect a candiate of their choice." *Id.* Moreover, Tilling accepted the rationale of increasing minority voters in Casey Jones district because the growth of the University of Toledo had displaced a number of individuals, causing some shift of population in his district, and because Jones might be nearing retirement age. *Id.* ¶ 195. The black population in Jones' district was increased from 41.70% to 49.99%, an increase of 8.29%. Defs.' Supp. Exs., Vol 1, Ex. DD.

8. In Summit County, the Board drew lines to enhance the possibility of electing new black candidates. Based on the conclusion that Rep. Vernon Sykes' district, H.D. 44 under the 1992 plan, was "losing black population and to avoid minority vote dilution." Bd. Findings ¶ 194, the Board increased the black population in Sykes' district from 35.40% to 43.07%, an increase of 7.67%, Defs.' Supp. Exs., Vol I, Ex. DD. Previously Sykes had been elected to five terms by margins of two-to-one. Bd. Findings ¶ 162.

9. In Montgomery County, the Board drew lines to guarantee the election of new black candiates. Again, based on "population shifts" and the desire to "avoid dilution of minority voting," the Board increased the black population in Rep. McLin's and Rep. Roberts' districts, H.D. 38 and H.D. 39, respectively under the 1992 plan. *Id.* ¶ 193. The black population in McLin's district was increased from 42.10% to 44.47%, an increase of 2.30% and the black population in Roberts' district was increased from 36.10% to

40.69%, an increase of 4.59%. Defs.' Supp. Exs., Vol I, Ex. DD.

10. In Hamilton County, the Board drew lines to enhance the possibility of electing new black candidates. The Board found the following:

> Mr. Tilling, in drafting the 1991 Apportionment Plan, also determined that the Voting Rights Act protected classes of voters not incumbents. Since Representative Mallory is in his 60's, there is a particular need to reconfigure House District 23 [H.D. 31 in the 1992 plan] to increase the relative percentage of black population in that district in order to provide an opportunity for a new black candidate, without the benefit of incumbency, to be elected in the district.

Bd. Findings ¶ 183. Accordingly, the Board increased the black population in Mallory's district from 45.90% to 49.16%, an increase of 3.26%. Defs.' Supp. Exs., Vol I, Ex DD. The Board also increased the black population in Rep. Rankin's district, H.D. 30 in the 1992 plan, from 53.20% to 55.98%, an increase of 2.78% in a district that was already a majority-minority district. *Id.* The Board increased the black population in Rankin's district allegedly because "[a] new black candidate would require a district with increased black population to be successful." Bd. Findings ¶ 186.

11. In addition to the Apportionment Board's Findings and Conclusions, Tilling, who was the principal architect of the apportionment plan, kept handwritten notes that indicated his procedure and his use of race in drawing the original apportionment plan. *See* Pls.' Ex. Prior Proceeding B, No. 120. The notes revealed that in his first five steps Tilling calculated the ideal population size of the Senate and House districts, pursuant to Article XI, Section 2 of the Ohio

Constitution, and determined those counties that had populations within five percent of the ideal in accordance with Article XI, Section 10 of the Ohio Constitution. Beginning with step six and continuing with each urban county thereafter, the notes repeatedly indicate that Tilling displayed the minority population of each urban county on his computer screen and then drew the "minority districts" first before proceeding. This process and the attention to racial composition was confirmed at the hearing when Tilling testified concerning the maps of the urban districts drawn in accordance with the process contained in the notes. Hr'g Tr. at 344-51. Viewed sequentially, the maps indicated that for each urban county, the minority population was displayed; the most heavily black districts were drawn first; and each succeeding district that was drawn contained a decreasing percentage of black population. The Plaintiffs claim that the maps in conjunction with the notes establish that race was "the predominant concern of Mr. Tilling and the Board." Pls.' Post Trial Br. at 14. The Defendants contend that Tilling's notes and the corresponding maps are irrelevant because they refer to the original "model" plan that Tilling submitted to the Board on September 26, 1991. Although it is true that this exact plan was never in effect and was modified on numerous occasions, we still find it probative of the Defendants' consideration of race in the redistricting process. The fact remains that a not-too-distant forerunner of the 1992 plan was drawn in the aforementioned manner, and the Defendants do not contend that the 1992 plan totally discarded the procedure and results of the original plan.

12. Based on the foregoing facts, we conclude that race was a substantial and motivating factor in the Defendants' creation of House districts 21, 22, 30, 31, 38, 39, 44, and 49 in the 1992 plan. These House districts are the result of racial gerrymandering. Al-

though none of these districts presents a bizarre shape, both direct evidence from trial testimony and the Apportionment Board's Findings and Conclusions, and circumstantial evidence from Tilling's notes and the accompanying maps, reveal that the Defendants intentionally crafted these eight districts, at least in part, with the purpose of seperating voters on the basis of race.

13. Because race was a substantial and motivating factor in the 1992 plan, it must be subjected to strict scrutiny analysis. *Reno*, 113 S. Ct. at 2825, 2826, 2830. Thus, the burden of production shifts to the Defendants to show that the 1992 plan was narrowly tailored to meet a compelling state interest. *See Croson*, 488 U.S. at 505; *Hunt*, 861 F. Supp. at 436.

14. The Defendants claim that compliance with section 2 of the Voting Rights Act was the compelling state interest that justified their race-based redistricting. Defs.' Post Trial Br. at 57-63.

15. The Defendants agree that in order to show that section 2 of the Voting Rights Act was a compelling state interest, they must have a strong basis in evidence that race-based redistricting was necessary as a remedial measure to comply with the Voting Rights Act. *Id.* at 59-60. Moreover, the Defendants agree that a state has a "strong basis in evidence" to conclude that it needs to engage in race-based redistricting to comply with section 2 of the Voting Rights Act when the state has information that is reasonably sufficient to lead it to conclude that the relevant minority group could make out a prima facie section 2 challenge to the existing plan. *Id.* at 59, 60, 63.

16. As we noted earlier, a plaintiff can establish a prima facie case of a violation of section 2 of the Voting Rights Act by providing evidence that satisfies the three *Gingles* preconditions:

> First, [the plaintiff] must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, [the plaintiff] must prove that the minority group " 'is politically cohesive.' " Third, the plaintiff[] must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' "

Voinovich v. Quilter, 113 S. Ct. at 1157 (quoting *Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986))).

17. Assuming without holding that the Defendants possessed information that would lead them to reasonably conclude that a plaintiff could satisfy the first two *Gingles* factors, we hold that the Defendants did not have a "strong basis in evidence" to engage in race-based redistricting in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan because they did not possess information that would reasonably lead them to conclude that a plaintiff could satisfy the third *Gingles* factor—the presence of racial bloc voting.

18. Both this court and the Supreme Court previously held on the basis of all the evidence, that racially polarized voting did not exist in Ohio's legislative elections. The Court noted the following:

> [A]ppellees [Plaintiffs in this case] have failed to demonstrate *Gingles*' third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The District Court specifically found that Ohio does not suffer from "racially polarized voting." 794 F. Supp. at 700-01. Accord,

App. to Juris. Statement 132a-134a, and n.2, 139a-140a. Even appellees agree. *See* Tr. of Oral Arg. 25. Here, as in *Gingles*, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Gingles*, 478 U.S. at 49 n.15, 106 S. Ct. at 2766 n.15.

Quilter, 113 S. Ct. at 1158; *see also Quilter*, 1992 WL 677145, at *4 & n.2, n.3, *8 (holding that Ohio has coalitional voting, where whites cross over and vote for black candidates, and not polarized voting, where whites vote for whie candidates and blacks vote for black candidates). By relying on these precedents, we are not saying that the Apportionment Board could not take race into account unless and until it had been proven in a court that a violation of section 2 of the Voting Rights Act had occurred. As we noted earlier, a state is not required to await a judicial finding that it has committed past or present discrimination before it voluntarily takes remedial action to eradicate the discrimination, so long as it has a " 'strong basis in evidence for its conclusion that remedial action was neccessary.' " *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277). Our point in noting the previous rulings of this court and the Supreme Court regarding the absence of polarized voting in Ohio was to emphasize that what was readily and reasonably apparent to and held by the courts, also should have been reasonably apparent to the Defendants—racially polarized voting does not exist in Ohio's legislative elections.

19. The Defendants contend that Tilling reasonably concluded that "racial bloc voting existed throughout Ohio." Defs.' Post Trial Br. at 62 & n. 45. Yet, the bivariate regression analysis of the Plaintiffs' expert, Dr. Henderson, for the election years 1990, 1986,

and 1984, revealed the presence of coalitional voting in each of the districts where the Defendants, through Tilling, chose to engage in race-based redistricting in the 1992 plan. *See Quilter*, 1992 WL 677145, at *4 & n.2. The percentage of white cross-over vote in each of those districts was as follows: Rep. Mallory —50.66%; Rep. Rankin—50.93%; Rep. Miller—44.50%; Rep. Beatty—50.25%; Rep. McLin—35.44%; Rep. Roberts—45.98%; Rep. Sykes—48.76%; Rep. Jones—44.46%. *Id.* at *4 n.2. Prior to the time that the Defendants adopted "Amendment D," the 1992 plan, their own expert, Dr. King, analyzed over 200 elections throughout Ohio, and he concluded that a "degree of racially polarized voting existed in Ohio," but he was not willing to characterize the degree of racial polarization as "legally significant." Defs.' Post Trial Br. at 63 & n. 47. Regardless of Dr. King's ability to comment on the "legal" significance of his analyses, the fact remains that Dr. King did not challenge Dr. Henderson's results on this point. *See Quilter*, 1992 WL 677145, at *4 n.3. Dr. King's own results regarding polarized voting in Ohio revealed that on average 95% of blacks voted for black candidates and 56.7% of whites voted for black candidates, thereby confirming Dr. Henderson's results. *Id.* at *4 n.2. In the Apportionment Board's Findings and Conclusions, the Board even admitted the presence of white cross-over voting in the minority districts where race-based remedial measures were utilized. Bd. Findings ¶ 168. Given the overwhelming statistical evidence of coalitional voting under the existing plan, and given the fact that the Defendants had this information available to them before they adopted the 1992 plan, with its race-based remedial measures, we find that the Defendants could not reasonably conclude that the relevant minority group could establish a prima facie case of a violation of section 2 of the Voting Rights Act. Significant evi-

dence of white majority bloc voting in Ohio's legislative districts did not exist.

20. Because the Defendants did not possess a strong basis in evidence that they needed to engage in race-based redistricting to comply with section 2 of the Voting Rights, the Act does not provide a compelling state interest to justify the remedial action. *See Hunt*, 861 F. Supp. at 440.

21. Because the Apportionment Board lacks a compelling state interest for its racial gerrymandering in House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan, we conclude that these districts violate the Equal Protection Clause of the Fourteenth Amendment. Based on our holding, we find it unnecessary to discuss whether the 1992 plan was narrowly tailored to further a compelling state interest.[9]

IV. Conclusion

The Fourteenth and Fifteenth Amendments to the United States Constitution, and the Voting Rights Act of 1965 have been major vehicles for the empowerment of black Americans long denied the full enjoyment of their political rights. Over the years, various schemes and artifices have been designed to serve as impediments to the attainment of citizenship status by minorities. As Justice Frankfurter, however, wrote for the Supreme Court in *Lane v. Wilson*,

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[9] We note, however, for instructional purposes that any redistricting plan that, for race-based remedial purposes, proposes to move black voters into a district that already has more than 35% black population, may have a difficult time passing the narrowly-tailored prong of strict scrutiny analysis. Statistical evidence in Ohio revealed that there was only one legislative district in the last twenty-five years that had more than 35% black population and did not elect a black candidate. *Quilter*, 1992 WL 677145, at *8 & n.5. Thus, currently in Ohio, 35% black population in a district is considered adequate to provide the black population with an equal opportunity to elect the candidate of its choice, since it has been shown that Ohio does not have a history of racially polarized voting in the state legislative districts at issue here. *Id.*

307 U.S. 268, 275 (1939), "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Without characterizing the nature of the discrimination present here, we simply hold that Justice Frankfurter's admonition is equally applicable to the Equal Protection Clause of the Fourteenth Amendment. Using race to draw lines to concentrate black voters in discrete legislative districts with the reciprocal effect of siphoning off and reducing their influence in other districts, without legally cognizable justification, is incompatible with the Constitution, as now interpreted by the Supreme Court. Accordingly, we direct the State Defendants to redraft House districts 21, 22, 30, 31, 38, 39, 44, and 49 of the 1992 plan to comply with the aforementioned principles.

In placing reliance on this court's and the Supreme Court's holdings that racial bloc voting had not occurred in Ohio's legislative elections, we make no judgment as to the state of racial progress in other aspects of race relations in Ohio. The fact that black voters, however, in the various legislative districts, as shown by the record in this case, coalesce with white voters in significant enough numbers to elect candidates of their choice, who happened to be black, demonstrates a high degree of maturity. In our view, this degree of voter maturity represents the essence and ultimate objective of the Voting Rights Act and the Constitution. We must not, we dare not permit a retreat from this admirable advance in electoral politics by approving a plan such as this.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze, Sr.
ANTHONY J. CELEBREZZE, SR.
U.S. Circuit Judge

Dowd, J., dissenting.

The reapportionment of the Ohio General Assembly, required and strictly controlled by the Ohio Constitution, is done every ten years and follows the decennial census. Increases, decreases and shifts in population inevitably require that the boundary lines for the 99 seats in the House of Representatives be redrawn and, as a consequence, the boundary lines for the 33 seats in the Senate since each senate district consists of three discrete house districts.

The Apportionment Board (the Board), as established by the Ohio Constitution, consists of the Governor, the Secretary of State, the State Auditor and a single representative from each of the two major political parties in the Ohio General Assembly. Consequently, the political party that controls at least two of the three statewide offices will have majority representation on the Board.

At the time of the most recent reapportionment, for the first time in 30 years, the Republican Party, holding the offices of Governor and Secretary of State, had a majority of three on the Board. The two minority members of the Board, Auditor Ferguson and Representative Quilter together with other members of the Democratic Party commenced litigation to wrest control of Ohio's reapportionment process from the majority of the Board and place it with the federal court system. The litigation, in its fourth year, continues—even *after* two elections conducted pursuant to Amendment D adopted by the majority of the Board.

The first effort to shift the responsibility for reapportioning Ohio from the Board failed with the decision of the United States Supreme Court in *Voinovich v. Quilter*, —— U.S. ——, 113 S.Ct. 1149 (1993)[1] and the subse-

[1] The rulings challenged before the Supreme Court were reached in several incremental steps. On January 31, 1992, a majority of this Court, addressing only the federal statutory challenge, found in favor of the plaintiffs and ordered that the Board either redraft the Plan or demonstrate that the existing Plan was remedying a

quent decision of this Court in *Quilter v. Voinovich*, 857 F.2d 579 (N.D. Ohio 1994) responding to the Supreme Court's remand of the issue of whether the deviations in excess of 10% in the size of several districts in Ohio violated the Fourteenth Amendment.

Before this Court responded to the remand issue in March of 1994, but after the announcement of the *Voinovich* decision, and in contrast to that unanimous decision, the United States Supreme Court by a five-four vote held in *Shaw v. Reno*, —— U.S. ——, 113 S.Ct. 2816 (1993) that a complaint that alleges redistricting so bizarre on its

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Section 2 violation. *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992). I dissented. Subsequently, the Board presented to the Court its justification for the creation of majority-minority districts, along with certain "technical" amendments to the Plan. The Board's Findings and Conclusions are on the record of this case at Docket No. 147, Exhibit A. They include findings that voting in Ohio is significantly racially polarized, that there is a history of official discrimination in Ohio affecting the rights of minorities to participate in the democratic process, that there is racial bloc voting, and that minorities have experienced racial barriers to effective participation in the democratic process in Ohio. (Docket No. 147, Exh. A, ¶¶ 99-100, 107-137). These findings were simply disregarded by the majority when, on March 10, 1992, it held once again that the Plan, as amended, violated the Voting Rights Act. The Court appointed a special master to prepare a redistricting plan. *Quilter v. Voinovich*, 794 F. Supp. 756 (N.D. Ohio 1992). Again I dissented. Later, a majority of the Court found that the Plan also violated the Fourteenth and Fifteenth Amendments to the United States Constitution. *Quilter v. Voinovich*, No. 5:91CV2219, 1992 WL 677145 (N.D. Ohio Mar. 19, 1992). In that opinion, the majority specifically found that there were "three critical facts: the absence of racial bloc voting, the fact that black voters have been able to elect both black and white candidates of their choice, and the fact that such candidates have been elected over a sustained period of time." *Id.* at *2. The Supreme Court never directly addressed these particular findings of the majority, other than to note them. *See, Voinovich v. Quilter*, 113 S.Ct. at 1154. I, however, adhere to my original view that the defendants did properly justify a need to create majority-minority districts. *Quilter v. Voinovich*, 794 F. Supp. at 758 (Dowd, J., dissenting).

face that it is unexplainable on gounds other than race states a cause of action under the Equal Protection Clause of the Fourteenth Amendment and is not subject to a motion to dismiss. The Supreme Court majority further held that such allegations demand the same strict scrutiny under the Equal Protection Clause that is given other state laws that classify citizens by race.

Following *Shaw v. Reno*, the paintiffs were permitted to file an amended complaint and, for the first time, raised an equal protection claim. The Court heard testimony for two days in November of 1994 and the positions of the parties have been fully briefed.

I respectfully dissent from the opinion of my colleagues as I believe judgment should be entered for the defendants on several grounds, each of which stands independently of the others. Further, my reasoning is based upon facts which I would have included in the Findings of Fact, had I written the majority opinion. These facts are attached to this dissent as Appendix A. Several of the facts are also incorporated herein.

I. THIS THREE-JUDGE PANEL'S CONSIDERATION OF THE PLAINTIFFS' ACTION TO SET ASIDE THE REAPPORTIONMENT OF THE 99 HOUSE DISTRICTS AND 33 SENATE DISTRICTS FOR THE OHIO GENERAL ASSEMBLY WAS LIMITED TO THE SCOPE OF THE REMAND BY THE UNITED STATES SUPREME COURT AND CONSEQUENTLY THIS COURT SHOULD NOT HAVE PERMITTED THE PLAINTIFFS TO FILE A SECOND AMENDED COMPLAINT RAISING FOR THE FIRST TIME THE EQUAL PROTECTION CLAIM.

It is well estabished that an inferior court does not have, save in unusual circumstances, the power or authority to deviate from the mandate issued by an appellate court. *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306

(1948); *Stanton v. Stanton*, 429 U.S. 501, 502, 504 (1977).

The Supreme Court remanded this case for a single and limited purpose of determining whether the Plan's deviation from equal population among the districts violated the Fourteenth Amendment. *Voinovich v. Quilter*, —— U.S. —— 113 S.Ct. at 1154. Upon remand, this Court decided that issue. *Quilter v. Voinovich*, 857 F. Supp. 579 (N.D. Ohio 1994). Consequently, this case should have been concluded at that point.

In granting the plaintiffs' motion for leave to file a second amended complaint, the majority of this Court reasoned that because *Shaw v. Reno* was decided after the Supreme Court issued its decision in this case, the Ohio reapportionment plan should be reevaluated. *Quilter v. Voinovich*, 157 F.R.D. 36, 40 (1994). Assuming that concept has merit, such review required a new lawsuit and a new draw, with a probable different three-judge panel.[2]

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[2] This district court has gone to great lengths in the past five years to avoid any opportunity for lawyers to select the judge they wish to have adjudicate their lawsuit. The related case rule has been abolished and, consequently, even if a new case appears related to an existing case on another judge's docket, it cannot be shifted to the docket of the judge who drew the first case absent the consent of both judges. *See*, Local Rules 1:2.4(2) and 6:2.5(c). Moreover, one judge cannot transfer an unrelated case on his or her docket to another judge without the approval of the Chief Judge of the district. *See*, Local Rule 6:2.4. Consequently, had "new law suit" been filed challenging the reapportionment based on *Shaw v. Reno*, it could have been filed in either the Northern or Southern District of Ohio and it would have been assigned to a judge of that district. The provisions of 28 U.S.C. § 2284 would then have been invoked and the Chief Judge of the Circuit would have had the opportunity to determine anew which judges he wished to assign to the case. However, a majority of this Court, presumably unaware of or, as Circuit Judges, completely indifferent to the impact of the Court's Local Rules, elected to use their assignment to this three-judge panel to give the plaintiffs another bite at the apple.

I dissented when my colleagues granted the plaintiffs the right to file a Second Amended Complaint to raise for the first time, post remand, an Equal Protection Claim. I continue to hold that it was an abuse of discretion to grant that motion and that this case should have been considered closed once the Court determined the issue remanded by the Supreme Court. Thus I would rule that the motion to allow the Second Amended Complaint was improvidently granted. I would revisit the motion, deny it and close the case.

II. THE EQUAL PROTECTION CLAIM IN A LEGISLATIVE REAPPORTIONMENT CASE IS CONSTRAINED BY THE NARROW LIMITS OF THE MAJORITY OPINION IN *SHAW V. RENO* AND AN EXAMINATION OF THE REAPPORTIONED BOUNDARY LINES OF THE HOUSE AND SENATE DISTRICTS IN OHIO DEMONSTRATES CONCLUSIVELY THAT THEY CANNOT BE EXPLAINED ON THE BASIS OF RACE ALONE.

The Supreme Court has interpreted the "one person, one vote" principle to protect the collective rights of citizens to vote as a cohesive unit. *See Shaw v. Reno*, —— U.S. ——, ——, 113 S.Ct. 2816, 2823 (1993) (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)). As an outgrowth of the freedom of association in Article I, § 2 of the United States Constitution, the "one person, one vote" principle protects that cherished freedom to associate with others of like views, backgrounds or beliefs when bringing a united voice to the ballot box. Yet "equal protection" of the right to vote does not limit itself to the very public process of association through coalitional voting. "Equal protection" of voting rights if it means anything must protect the rights of the individual as well. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (state's conditioning of the right to vote on the payment of poll tax violates the

Equal Protection Clause of the Fourteenth Amendment). *See also Gomillion v. Lightfoot*, 364 U.S. 339, 349 (1960) (redistricting of Tuskegee Alabama constituted an unlawful segregation of races of citizens in violation of the Equal Protection Clause of the Fourteenth Amendment) (Whittaker, J., concurring), *approved by Shaw v. Reno*, 113 S.Ct. at 2825-26; *Wright v. Rockefeller*, 376 U.S. 52 (1964) (Fourteenth and Fifteenth Amendment challenge to racial gerrymandeing of a congressional district stated a constitutional claim, although plaintiffs failed to meet their burden of proof at trial), *interpreted by Shaw v. Reno*, 113 S.Ct. at 2826.

Congress through the enactment of the Voting Rights Act has emphasized judicial protection of coalitional voting rights. As a result, courts have been quick to recognize that coalitional concepts such as vote dilution should be recognized as part and parcel of Fourteenth Amendment equal protection doctrine. Discussions of minority voting strength, racial bloc voting, cohesiveness, etc. became reflections of this aspect of equal protection. But these discussions of the coalitional protections guaranteed by the Fourteenth Amendment have at times overshadowed that aspect of the Amendment which guarantees the individual's voting rights. Courts faced with disparate precedent on the constitutional aspects of voting rights law have struggled to apply that law to particular cases. To a large extent those efforts have been successful. In part this may be due to the fact that as far as plaintiffs were concerned the rights of the individual and the rights of the group were not at odds. The equal protection concerns of the individual and the group to which that individual associated himself or herself were the same. This all changed with *Shaw v. Reno*, 113 S.Ct. 2816 (1993).

In *Shaw v. Reno*, individuals, who did not associate themselves with the group whose voting rights the state sought to protect, invoked the Fourteenth Amendment to

invalidate the state's efforts to protect the coalitional voting rights of those others. The Court did not prohibit the state from acting to protect the coalitional voting rights guaranteed by equal protection. Instead it held that the state could not act to protect those coalitional voting principles by creating a voter eligibility classification—in this case by creating a classification through the use of the district system—"so irrational on its face that it can be understood only as an effort to segregate voters . . . because of their race . . . ." 113 S.Ct. at 2832. By striking the balance between individual and coalitional Fourteenth Amendment rights in this way, the Court defined the limits of a Fourteenth Amendment claim based on individual guarantees to equal protection. That the holding of *Shaw v. Reno* was limited to Fourteenth Amendment challenges to "bizarre" or "irrational" districts stems from the Court's recognition of the individual right at issue: the right not be segregated on the basis of race into bizarre or irrational districts when the state acts to protect the coalitional voting rights of others.

The nature of the individual right addressed by *Shaw v. Reno* is easily understood. At law, the "district" system can be understood as a type of voter eligibility classification theoretically indistinguishable from a poll tax, literacy test or residency requirement. *Compare Guinn v. United States*, 238 U.S. 347 (1915) (state use of literacy test and grandfather clause to determine one's eligibility to vote violates the Fifteenth Amendment). Each of these attributes—payment of the tax, the ability to read and write, or geographic domicile—constitutes a characteristic without which a vote cannot be cast. Likewise, in elections for representatives in a multimember legislative body, a voter who must vote under a district voting system cannot cast a ballot for the candidate or his or her choice if that candidate happens to be running in another district. Without the characteristic of residing within the district, a voter cannot cast a ballot. This is not the case in an at-large voting system. To the con-

trary, in an at-lage system an otherwise qualified voter can cast a ballot for whatever candidates or slate of candidates choose to vie for a seat in the legislature, with only the top vote-getters being seated.[3] By enacting a district system instead of an at-large system, the state favors locality-based elections over ones which emphasize the majority interests of the larger political geography. In a district system it might make sense for representatives to "bring home the bacon" as it were, while in an at-large system the interests of the overarching majority predominate. Thus, this locality-based voter eligibility classification expressed by the district system is an attribute of the law for which individual voters deserve equal protection. If the state acts to deprive an individual of equal protection of this law, then a remedy may be had through the Fourteenth Amendment.

As is the case of other voter eligibility classifications, however, the mere fact that the state selects one classification over another does not give rise to an equal protection claim. The mere process of districtng classifies voters. But that classification alone creates no constitutional violation. Moreover, the individual citizen *vis a vis* other individuals has no general right to be drawn into one district or to be drawn out of another. As long as the citizen is included in one district that is enough. Citizens as a group, however, do have a coalitional equal protection right to have certain of their associational interests protected in the line-drawing process. Thus, in general, the coalitional interests of the group predominate over the individual's interests and the state may engage in districting that recognizes those group interests. The difficulty comes with the realization that when the state drafts a district boundary to protect the coalitional interests of a

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[3] Of course where an election is held for a single political office such as with elections for a president, governor, mayor, or county executive, the district system and the at-large system are one in the same.

group, the state simultaneously selects a voting classification for the individual based on that group interest. The line is drawn and the voter is classified. *Shaw v. Reno* stands for the proposition that where the line drawn is "so irrational on its face that it can be understood only as an effort to segregate voters . . . because of their race . . . ," 113 S.Ct. at 2832, then the state has crossed the line separating the proper from the improper state recognition of coalitional voting rights. In such a case the individual's equal protection right not to be subject to a voter eligibility classification designed to segregate the individual into a district based on race predominates over the state's legitimate interest in protecting the coalitional voting rights of others.

The Court in *Shaw v. Reno* defined the line that separates the permissible from the impermissible state recognition of coalitional voting rights with its quotation of the opinion of Justice White, joined by Justices Stevens and Rehnquist, in *United Jewish Organizations v. Carey*, 430 U.S. 144, 168 (1977):

> "[W]e think it . . . permissible for a State, *employing sound districting principles such as compactness and population equality*, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous *and whose residential patterns afford the opportunity* of creating districts in which they will be in the majority."

Shaw v. Reno, 113 S.Ct. at 2829 (quoting *UJO*, 430 U.S. at 68) (emphasis added).[4] This opinion of Justice White

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[4] *Cf. also Karcher v. Daggett*, 462 U.S. 725, 740-44 (1982) (acknowledging that the state may vary from "one person, one vote" principles for "[a]ny number of consistently applied [nondiscriminatory] legislative policies . . . [including] making districts compact, respecting municipal boundaries, preserving the cores of

in *UJO* as endorsed by the majority in *Shaw v. Reno* defines the nature of a Fourteenth Amendment individual voting rights equal protection claim. Voting district classifications which group voters on the basis of race while adhering to the traditional districting principles announced by Justice White in *UJO* must be challenged if at all based on the vote "dilution" principles embodied in such cases as *Rogers v. Lodge*, 458 U.S. 613 (1982) (at large election challenged under the Fourteenth and Fifteenth Amendments) and *Reynolds v. Simms*, 377 U.S. 533, 555 & n. 29 (1964) (district reapportionment challenged under the Fourteenth Amendment).[5] When the state makes voting district classifications which do not adhere to traditional districting principles, then the use of districting by the state to protect coalitional interests by segregating voters on the basis of race states a claim for a prima facie violation of the Fourteenth Amendment. However, as demonstrated by the evidence in this case viewed in the light most favorable to the plaintiffs, such is not the case here. Consequently, the Court's reliance on *Shaw v. Reno* is misplaced.

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prior districts, and avoiding contests between incumbent Representatives," and implicitly acknowledging that "preserving the voting strength of racial minority groups" might be one of those policies); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 583-84 (1990) (minorities have particular viewpoints worthy of protection in the effective exercise of their electoral franchise such that neither the Fourteenth nor the Fifteenth Amendments mandate any *per se* rule against using racial factors in districting and apportionment).

[5] The Court expresses no opinion on whether failure to abide by these traditional districting principles when creating voter eligibility qualifications on bases other than race states a claim under the Fourteenth Amendment. *See generally Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966) ("Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.").

The plaintiffs' claim that the reapportionment of the eight challenged house districts [6] constitutes racial gerrymandering under *Shaw v. Reno* is devoid of proof. Once again, it is helpful to recall the advice of Bernard Grofman, a national expert on apportionment issues as they relate to minority interests: "One approach to eliminating or reducing gerrymandering is through statutory or state constitutional provisions that strictly implement formal criteria such as compactness, equal population, and maintenance of the integrity of political subunits." *Quilter v. Voinovich*, 794 F. Supp. 695, 704 (Dowd, J., dissenting).

The Ohio constitutional provisions mirror Grofman's advice. Moreover, the apportioning of Ohio has produced a system whereby blacks are successful in electing members of their race to the Ohio General Assembly in impressive numbers.

The plaintiffs' claim that the 1991 reapportionment of Ohio constitutes racial gerrymandering fails at the outset because the plaintiffs are unable to point to any house

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[6] Although the majority opinion accepts the plaintiffs' assertion that they are challenging the entire Plan, not just these eight districts I find that the Second Amended Complaint cannot reasonably be read to challenge any more than the eight specified districts. Paragraph 56 of the Second Amended Complaint alleges that "[t]he districts which have been modified solely on the basis of race *include* House Districts 31, 30, 22, 21, 38, 39, 44 and 49." (emphasis added). Plaintiffs take the position that these eight districts are merely illustrative of the racially gerrymandered districts. However, if the entire Plan were really being challenged, there would be no need to state that the Plan "included" these districts. It is a given that the Plan includes *all* of the House Districts, these eight as well as those not specified. Furthermore, ¶ 55 of the Second Amended Complaint, which alleges that the defendants have drawn irregular districts "in numerous places throughout the state," further supports the interpretation that only certain districts are being challenged, not the entire plan. Notwithstanding plaintiffs' present position, I would find that the Second Amended Complaint states a *Shaw v. Reno* claim only as regards the eight specified districts.

district in Ohio where the boundaries of the district can be explained solely on the basis of race. The only such attempt, i.e., to describe a district as "bizarrely drawn," was made by the plaintiffs' sole witness. Dr. Gordon Henderson pointed to the northwest portion of House District 38 as constituting a "moose head" or a "hand with two fingers showing." Henderson contended that the division of House Districts 38 and 39 with the so-called "moose head" was not explainable by the Ohio Constitution but was done to pick a significant number of black voters and put them in District 38. In fact, and as demonstrated by the defendants and not contested, the "moose head" followed the boundary lines of the City of Dayton as required by the Ohio Constitution.

In my view, Amendment D, as it relates to the eight challenged districts before the Court, reflects adherence to traditional districting principles of compactness, contiguity and respect for the integrity of political subdivisions inherent in Article XI of the Ohio Constitution. Given the major population shifts which occurred during the last decade in the State of Ohio, most of the districts established in 1981 could not be retained under Article XI, § 7(D). Further, the requirements of Article XI, §§ 8, 9 and 10 take precedence over those §7(D) and preclude the retention of most of the 1981 districts.

It is also my view that the eight challenged districts are not "extremely irregular," "highly irregular," "so irrational" or "bizarre" as to be only attributable to race-based line-drawing for the purpose of segregating the races. Rather, they are regularly drawn, compact, contiguous and geographically cohesive as required by Article XI of the Ohio Constitution.

Since "irregularity" is a somewhat subjective matter, I find that even if one were to find irregularity in the boundaries of those districts, it can be explained with reference to the boundaries of political subdivisions, in conjunction with the populations of those various sub-

divisions. The split of certain communities result from the fact that these communities exist geographically in noncontiguous sections. In addition, in some instances, changes in the ward and precinct boundaries, coupled with changes in population, contribute to what some might judge to be "unusual" district boundaries.

Although there may have been other constitutionally-permissible ways of drawing these districts, the Board, by drawing them as it did, has not engaged in racial gerrymandering and has not violated the Equal Protection Clause of the United States Constitution.

Given the narrow construction and limited application of *Shaw v. Reno*, combined with absence of any demonstrable evidence that the boundaries of the House Districts are so bizarre as to be explainable on the basis of race alone, the defendants are entitled to judgment on the plaintiffs' Equal Protection Claim because of a faliure of proof on the part of the plaintiffs.[7]

III. THE PROOF OFFERED IN SUPPORT OF THE SECOND AMENDED COMPLAINT IS IN REALITY A THINLY DISGUISED ATTEMPT TO REVISIT THE DILUTION ISSUE ALREADY ADVERSELY DECIDED TO THE PLAINTIFFS BY THE SUPREME COURT'S DECISION.

As indicated in the brief submitted by the Justice Department, the plaintiffs' Second Amended Complaint presents a *Shaw v. Reno* claim "in only the most cursory manner." Moreover, as predicted by the Justice Department, the plaintiffs offered precious little evidence that the challenged house districts were so irregular that they were explainable solely in racial terms. To the contrary, and in keeping with the mandates of the Ohio Constitution, the legislative districts look quite regular and compact.

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[7] The Court solicited an amicus brief from the Justice Department and that brief, in a more scholarly fashion that this dissent, arrives at the same conclusion.

In contrast to a *Shaw v. Reno* claim, which was offered as the basis for granting the motion to file the Second Amended Complaint, the testimony offered is a thinly disguised attempt to renew the dilution claim by offering it in a *Shaw* garment.

The Second Amended Complaint focused on eight House Districts for being so irregular as to be explained on race alone. The eight districts, as configured by Amendment D, are composed as follows, with the first number being the percentage of black population in each district and the second number being the percentage of black voting age population in that district:

1) House District 21 (Franklin County)—54.30% and 48.30%.

2) House District 22 (Franklin County)—44.68% and 40.98%.

3) House District 30 (Hamilton)—55.98% and 52.72%.

4) House District 31 (Hamilton)—49.16% and 43.13%.

5) House District 38 (Montgomery)—44.47% and 41.56%.

6) House District 39 (Montgomery)—40.69% and 36.71%.

7) House District 44 (Summit)—43.07% and 39.86%.

8) House District 49 (Lucas)—49.99% and 46.42%.

In only one of the challenged districts is there a majority of black voters. There is nothing in the challenged districts which remotely approaches the political apartheid fear which appears to be the motivating factor in *Shaw v. Reno*. 113 S.Ct. at 2827. In reality, the plaintiffs seek an expansion of *Shaw v. Reno* to inclure any reapportionment plan that is race-conscious and, in so doing, to

expand the realm of judicial supervision to every reapportionment plan. Here, the plaintiffs wish to apportion the black voters not to insure the election of additional candidates of choice for blacks, as is the motive behind much of the Voting Rights litigation, but to have the black voters distributed in such a fashion that they will have maximum voting power. That is a dilution claim rather than a *Shaw v. Reno* claim. I dissent for the additional reason that the majority's opinion constitutes a renewed attempt to reapportion to maximize black voting power, a remedy rejected by the Supreme Court in this case.

IV. ASSUMING ARGUENDO THAT PLAINTIFFS HAVE ESTABLISHED A PRIMA FACIE CASE OF AN EQUAL PROTECTION VIOLATION, THE PROOF OFFERED BY THE DEFENDANTS IN SUPPORT OF AMENDMENT D ENTITLES THE DEFENDANTS TO ADJUDGMENT UNDER A STRICT SCRUTINY EVALUATION.

As my colleagues in the majority have concluded, under Equal Protection jurisprudence a reapportionment plan that classifies citizens on the basis of race, even though not explicitly, requires strict scrutiny; that is, the plan can be upheld only if it is narrowly tailored to further a compelling state interest. *Shaw v. Reno*, 113 S.Ct. at 2825. The Supreme Court made clear that even if a racial gerrymander is done for the "benign" purpose of enhancing minority voting strength, it must be reviewed with strict scrutiny. *Shaw v. Reno*, 113 S.Ct. at 2830.

The Supreme Court, however, did not identify the threshold level of racial consideration that is necessary before a redistricting plan is characterized as a racial gerrymander subject to strict scrutiny. The Court defined "racial gerrymandering" in redistricting as "the deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes." *Shaw v. Reno*, 113 S.Ct. at 2823 (quoting *Davis v. Bandemer*, 478 U.S. 109, 164 (1986)

(Powell, J., concurring in part and dissenting in part)). That definitions seems not particularly enlightening in view of the apparent conflict of meaning between "deliberate" and "arbitrary" actions. The majority has devoted a considerable amount of time trying to find in *Shaw*'s progeny an answer to the "trigger" question.[8] However, since fundamental rights are at stake here (i.e., voting rights and equal rights), I simply take the view that caution requires strict scrutiny.[9]

The eight challenged districts will withstand strict scrutiny if they were drawn to meet a compelling state interest and if they were narrowly tailored to accomplish that

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[8] As the majority opinion has acknowledged, the *Shaw v. Reno* Court discussed the fact that, in the redistricting context, it is not mere race "consciousness" or "awareness" which triggers strict scrutiny. This is true because, when drawing district lines, the legislature is always aware of race, as well as other factors such as age, religion, economic status, and politician persuasion. The Supreme Court's position is consistent with the long-recognized distinction between race-conscious, as opposed to rase-based, decisions. *See, e.g., Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (" 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences" but rather implies "action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

As discussed at some length in the majority opinion, different courts since *Shaw v. Reno* have adopted different triggering tests. *See, e.g., Johnson v. Miller*, 864 F. Supp. 1354, 1372 (S.D. Ga. 1994), *probable jurisdiction noted*, 115 S.Ct. 713 (1995) (race the "substantial or motivating consideration"); *DeWitt v. Wilson*, 856 F. Supp., 1409, 1413 (E.D. Cal. 1994), *petition for cert. filed*, 63 U.S.L.W. 3127 (U.S. Aug. 8, 1994) (No. 94-275) (race "the sole criteria [sic]"); *Shaw v. Hunt*, 861 F. Supp. 408, 431 (E.D.N.C. 1994), *petition for cert. filed*, 63 U.S.L.W. 3439 (U.S. Nov. 21, 1994) (Nos. 94-923, 94-924) (" 'race-a-motivating-factor' triggering test").

[9] The notes of James R. Tilling strongly suggest that he purposefully considered race when he drew the house district boundaries reflected in Amendment D and challenged here. Since citizens were, at least in certain parts of the State, classified by race, the eight challenged districts arguably must be subjected to strict scrutiny.

goal. The State of Ohio has a compelling interest in complying with Article XI of its Constitution,[10] requiring compact and contiguous districts which respect boundaries of political subdivisions. *See, Reynolds v. Sims*, 377 U.S. 533, 578 (1964), cited in Shaw *v. Reno*, 113 S.Ct. at 2826, for the proposition that interests such as these are legitimate. *See also, Wright v. Rockefeller*, 376 U.S. 52 (1964) (where racial groups are highly concentrated in certain communities, districts which likewise concentrate those racial groups may reflect wholly legitimate purposes).

The State of Ohio also has the compelling state interest of complying with the Voting Rights Act.[11] As a matter of fact, at the time of the reapportionment under scrutiny here, the case of *Armour v. State of Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) had just made that clear. *Armour* was a challenge brought by black voters, after the 1981 reapportionment, claiming that the line drawn between two districts in Mahoning County split and diluted black voting strength in that community. *Armour* found that there *was* a history of discrimination against blacks such that blacks were deprived of an opportunity for effective participation in the democratic process. *Id.* at 1058-59. The court further found that there was racial bloc voting and that blacks were unable to elect candidates of their choice. *Id.* The *Armour* decision was issued on September 4, 1991, a mere month before the 1991 Reapportionment Plan was due. For that reason, the court did not order that the districts be redrawn. However, it did retain jurisdiction to see what would happen with the districts in the 1991 Plan.

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[10] There is no argument advanced that Article XI is facially in violation of the Equal Protection Clause. The plaintiffs have not challenged the constitutionality of Article XI.

[11] *See, United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 161-168 (1977) (plurality opinion); *id.* at 179-180 (Stewart, J., concurring in the judgment).

The defendants here were without a doubt aware of the *Armour* decision which *required* the Board to consider race when drawing lines. In a strange twist, the defendants having done what they were effectively ordered to do by the *Armour* court, the majority now levels a charge of "race motivation." It seems there is no way to win and no clear guidance for persons in the defendants' position.

V. REMEDY

The opinion of my colleagues declares that the apportionment of black voters in the eight legislative districts in Hamilton, Franklin, Montgomery, Summit and Lucas Counties is unconstitutional in the context of the Equal Protection Clause of the Fourteenth Amendment. However, the opinion fails to declare the contours of the remedy. Also, absent a remedial order, it would appear that there is no definitive judicial action from which the defendants could appeal. Assuming that the majority has not chosen to engage in rendering an advisory opinion, it would seem that the public officials charged with running the next election scheduled for 1996, the voters, and the potential candidates for the next election to the General Assembly, should be given some guidance on what happens next.[12] In addition, guidance is needed to reconcile the majority opinion with *Armour*. For example, under the teaching of *Armour*, it was acceptable to put 35% of the black voting age population into one district rather than split the blacks into two districts having 11% and 24% blacks, respectively. In *Armour*, that percentage of black voters was not considered packing and, in fact, was required to avoid minority vote dilution. In the instant case, where House District 39 in Montgomery County contains 36.71% black voting age population, the majority calls that impermissible "packing."

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[12] Since the 1996 Ohio Primary Election has been moved up to March 19, 1996, partisan candidates must declare their candidacy by no later than January 19, 1996. This time line could easily be put in jeopardy.

Presumably, the majority will eventually enter a Rule 54 final judgment and that judgment will undoubtedly delineate in considerable detail exactly what relief the plaintiffs are awarded. I also presume that the judgment entry will provide some guidance regarding deadlines and time lines in view of the upcoming primary and general elections. I reserve the right to comment on any such judgment after it is entered.

VI. CONCLUSION

In summary, I respectfully dissent for the following reasons:

1. A majority of this Court erred in granting the plaintiffs' motion to file a Second Amended Complaint which action was contrary to and in excess of the narrow limits of the remand from the Supreme Court.

2. The majority's expansive interpretation of the narrow teachings of *Shaw v. Reno*, if unchallenged, effectively converts the reapportionment process as mandated by the Ohio Constitution into a judicial exercise with no guidelines for the unprecedented exercise of federal judicial power.

3. In the event the opinion in *Shaw v. Reno* does provide, as my colleagues contend, that the state violates the Equal Protection Clause where race is a substantial and motivating factor in drawing boundary lines for reapportionment processes, the plaintiffs nevertheless have failed to prove that the race-conscious concerns of the majority members of the Ohio Reapportionment Board constituted a substantial and motivating factor in the drawing of the boundary lines for the eight challenged districts.

4. In the event the opinion in *Shaw v. Reno* does allow for, as my colleagues contend, the requirement that the state must demonstrate a compelling interest in the reapportionment of a legislative district where it is found that race was a substantial and motivating factor in the

drawing of the boundary lines of the challenged district, I find that the state has demonstrated such a compelling interest, i.e., compliance with the Voting Rights Act and the provisions of the Ohio Constitution which deal with reapportionment.

5. The decision of the majority fails to establish, for the purpose of guidance, what constitutes "dilution" as opposed to "packing" in the distribution of black voters into districts in highly urbanized counties in Ohio consistent with the reapportionment mandates of the Ohio Constitution.

6. The majority opinion of the Court is devoid of guidelines to direct state officials in the reapportionment process so as to, on the one hand, avoid offending the Voting Rights Act as interpreted by the decision in *Armour v. State of Ohio* and, on the other hand, avoid offending the Equal Protection Clause of the Fourteenth Amendment given the pronouncements of the majority in this case which reject that "bizarrely-drawn lines" are a condition of proof to an equal protection claim.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX A

FINDINGS OF FACT

1. The 1991 Apportionment Board (the Board) consisted of defendants, Governor George V. Voinovich, Secretary of State Robert A. Taft, Jr., and Ohio Senate President Stanley J. Aronoff, and two of the plaintiffs, Auditor of State Thomas E. Ferguson and Speaker Pro Tempore of the Ohio House of Representatives Barney Quilter. (Report of James R. Tilling, p. 2) (Tilling Report).[a]

2. On August 22, 1991, the Board appointed defendant James R. Tilling (Tilling), the then Chief Executive Officer of the Ohio Senate, as its Secretary. (Tilling Report, p. 2).[b]

3. Tilling has a Bachelor of Science degree in Social Sciences from Clarkson University and a Masters Degree in Political Science from the University of Illinois, with a major in urban and metropolitan politics; in addition, he has completed course work toward a doctorate. He is a former professor of political science at Ohio University where he taught from 1969-1976. (Tilling Report, pp. 2-3). During the four years prior to the convening of the Board, Tilling served on the Task Force of the National Conference of State Legislators (NCSL), a bipartisan group of legislators, legislative staff, and members of other interested groups from all fifty states. (Transcript of Proceedings, November 17, 1994, Docket No. 312 [TR-2], p. 197; Tilling Report, p. 3).

4. Voinovich, Taft, and Aronoff directed Tilling to draft and submit an apportionment plan which complied with the Ohio Constitution, the United States Constitution, and the Voting Rights Act, 42 U.S.C. § 1973, *et seq.*

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[a] A copy of the Tilling Report is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit A.

[b] Tilling was not himself a member of the Board. (Transcript of Proceedings, November 17, 1994, p. 274).

(TR-2, pp. 207-208). Pursuant to this authority, Tilling drafted the 1991 Apportionment Plan, including Amendment D. (Tilling Report, p. 2).

5. Tilling testified that by the Fall of 1990 he had developed a good understanding of the legal issues involved in re-districting and had become sensitized to those issues. (TR-2, p. 198). Among those issues was concern for the Fourteenth and Fifteenth Amendments to the United States Constitution, the Voting Rights Act and Ohio's constitutional requirements. (TR-2, p. 199).

6. Tilling testified that, in the course of his work on the NCSL Task Force, it was made clear to him by various groups representing minorities that the current interpretation of the Voting Rights Act was that, first, there should be no attempt to dilute minority voting strength and, second, every opportunity should be taken to increase minority voting strength. (TR-2, p. 201).

7. Article XI of the Ohio Constitution (Article XI or Art. XI) dictates the basic method for apportioning the State of Ohio for members of the General Assembly.[c]

8. The method for apportionment found in Article XI includes a framework not only for an orderly succession for apportionment (Art. XI, § 10), but also for principles of population equality (Art. XI, § 3), compactness, contiguity and geographical cohesion (Art. XI, § 7(A)), and respect for the boundaries of political subdivisions and communities of interest (Art. XI, §§ 7(B), 7(C), 8, 9 and 10).

9. The first requirement in the constitutionally-defined apportionment process is to determine the ideal population for a district by dividing the State's population by 99, the

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[c] A true and correct copy of Article XI of the Ohio Constitution is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit G. (Joint Stip., Docket No. 305, ¶4).

number of house seats. (Art. XI, § 2). In 1991, using the most recent federal decennial census information, that ideal mathematical number was 109,567. (Tilling Report, ¶ 6).

10. The Ohio Constitution specifies that the population of any house district cannot be less than 95% nor more than 105% of the ideal population number. (Art. XI, § 3). In 1991, that range in population was from 104,089 to 115,045. (Transcript of Proceedings, November 16, 1994 [TR-1], p. 78) (Docket No. 311).

11. The Ohio Constitution also requires that if a county, or part of a county, is not large enough to meet the population requirement of Section 3, the district must be formed by combining governmental units, giving preference in the following order: counties, townships, municipalities, and city wards. (Art. XI, § 7(B)).

12. Where a county or political subdivision is too large to comply with the Section 3 population requirement, the Ohio Constitution requires that the excess population be split off along geographical lines, giving preference in order as follows: townshsip, city ward, city, and village. Where division is necessary, only one unit may be divided between two districts. (Art. XI, § 7(C)).

13. Article XI, § 10 provides the sequence for creating and numbering house districts. The first step is to designate the counties which are either mandatorily or permissively entitled to be constituted as single member districts. (Art. XI, §§ 10(A) and 10(B)). In 1991, four counties (Allen, Warren, Columbiana and Wood) were in the mandatory category and three counties (Ashtabula, Fairfield and Wayne) were in the permissive category. (Tilling Report, ¶¶ 12, 13). The majority of the Apportionment Board elected to designate Fairfield, Wayne and Ashtabula as single member districts.

14. The next step is to create districts out of whole counties, beginning with the county having the largest

population, where obviously more than one house district will be allocated, and fixing the boundaries for the appropriate number of house districts. In this process, the remaining territory in any county must be combined with adjoining territory outside the county before proceeding to combine the remaining territory of the state into representative districts.[d] (Art. XI, § 10(C)). After the apportionment is completed for the most populous county, then the process moves to the next most populous county and continues in that fashion until all counties entitled to more than a single district have been accommodated. In Ohio, which has 88 counties, a substantial majority of the house districts are contained in the 26 most populous counties. House Districts 8 through 81 were created in this manner. (Tilling Report, ¶ 14).

15. Once the process has been completed with respect to counties entitled to more than one district, the apportionment of the remainder of the State is accomplished by following the provisions of Article XI, Section 10(D). Under this provision, the 62 counties which had a 1990 population number less than 90% of the ideal number of 109,567 were combined with other counties to create House Districts 82 through 99. (Tilling Report, ¶ 16).

16. Amendment D, also referred to as the 1992 Plan, is the currently effective version of the Apportionment Plan. Amendment D was effective during the 1992 and 1994 Ohio elections. (Joint Stip., Docket No. 305, ¶ 3).[e]

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[d] For example, Cuyahoga County, the most populous county, is entitled to 12.88 districts. *Quilter v. Voinovich*, 794 F. Supp. 695, 705 (N.D. Ohio 1992). Twelve of those districts must be contained wholly within Cuyahoga County and the thirteenth district will, of necessity, spill over into an adjoining county. Selecting a portion of the county for "spill-over" is governed by Article XI, § 7(C).

[e] The original 1991 Apportionment Plan, as amended by Amendment C, has not been used in any election and is no longer the current plan.

17. The Ohio Supreme Court has previously held that the Plan complies with the requirements of Article XI. *Voinovich v. Ferguson,* 63 Ohio St. 3d 198, 586 N.E.2d 1020 (1992).[f]

18. Between 1980 and 1990, the total population of Ohio remained virtually the same, with the State gaining only 50,000 people. However, there were significant population shifts within the State; specifically, there was a shift from the Northeast quadrant to the Central and Southwest portions, particularly to Franklin, Delaware, Union and Madison Counties. There also occurred a shift from Cincinnati and Hamilton County to Butler, Clermont and Warren Counties. Cuyahoga County lost one entire house district in population (109,000 people), while Franklin County gained one entire house district. Franklin County replaced Hamilton County as the second most populous county of the State. There were also significant population shifts from the inner cities to the suburbs, as well as changes in municipal corporation, ward and precinct boundaries.[g] (Tilling Report, ¶ 42-43).

19. In Ohio, significant minority populations are concentrated in the major urban counties. These populations are geographically compact and contiguous. (Tilling Report, ¶ 61, 65).[h]

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[f] A copy of this opinion is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit D.

[g] Several counties experienced significant changes in wards, for example: Franklin County went from 58 wards to 74; Lucas County went from 24 wards to 23; and Summit County ward boundaries were changed dramatically. (Tilling Report, ¶ 51).

[h] Maps showing the 1990 census concentration of voting-age blacks in each of the counties where districts are challenged are found at Defendants' Supplemental Exhibits, Vol. I, Exhibit T (Franklin County, Districts 21 and 22); Exhibit V (Hamilton County, Districts 30 and 31); Exhibit X (Montgomery County, Districts 38 and 39); Exhibit Z (Summit County, District 44); and Exhibit BB (Lucas County, District 49).

20. The plaintiffs have leveled a challenge against the formation of House Districts 21, 22, 30, 31, 38, 39, 44 and 49.[i] All of these districts are located in Ohio's major urban counties. (Tilling Report, ¶ 63).

21. Handwritten notes made by Tilling in the process of drafting Amendment C to the 1991 Plan reflect his step by step thought process in the line drawing. (Tilling Notes).[j]

22. Plaintiffs have challenged House Districts 21 and 22 in Franklin County.[k]

23. As regards H.D. 21, Tilling's notes indicate that he would first "draw minority districts" and that he would "avoid primarily white Bexley and Whitehall." (Tilling Notes on H.D. 21).

24. As configured in Amendment D, H.D. 21 contains a population of 108,859 consisting of the following political subdivisions:

Franklin County, OH

02 Columbus City—
Fifty-sixth Ward—
Twenty-third Ward—

25096023A Precinct A
25096023B Precinct B
25096023E Precinct E
25096023G Precinct G
25096023H Precinct H

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[i] *See*, note 4, in the dissenting opinion.

[j] A copy of the notes is found at Plaintiffs' Prior Proceeding Trial Exhibits, Vol. 2 of 4, Exhibit 120.

[k] A map of the Franklin County House Districts, including District 21 and District 22, is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit U. A map showing the political subdivision boundaries is found in the same Volume at Exhibit II.

Twenty-fifth Ward—
Twelfth Ward—
Thirteenth Ward—
Sixteenth Ward—
Seventeenth Ward—
Twenty-sixth Ward—
Forty-first Ward—
Sixth Ward—
Seventh Ward—
Eighth Ward—

15 Clinton Township—

(No Wards)

25M020B121531 Clinton B

21 Mifflin Township—

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

25. As H.D. 21 is configured in Amendment D, blacks are 54.30% of the total population. The black voting age population of H.D. 21 is 48.30%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

26. H.D. 21 is bordered by H.D. 26 and H.D. 27 on the north, H.D. 23 on the west, H.D. 22 on the south, and H.D. 25 on the north and east.

27. The boundaries of H.D. 21 are partially coterminous with the boundaries of the City of Columbus, which boundaries resulted from irregular annexation.[1] Clinton Township, part of which is in H.D. 21, consists of geographically non-contiguous sections. (TR-2, p. 225, 229-230; Tilling Report, ¶ 37c; Plaintiffs' Exhibit 1; Defendants' Supplemental Exhibit MM (Docket No. 319)). Ward 23, part of which is in H.D. 21, also consists of

[1] Tilling pointed out that what, to an outsider, might appear to be an "unusual" boundary is actually the result of Franklin county's having been "subjected to rampant annexations for at least the last 20 years." (TR-2, p. 225).

non-contiguous sections. (Tilling Report, ¶ 37c; Plaintiffs' Exhibit 1, Defendants' Supplemental Exhibit MM).

28. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 21, there being no challenger. (Defendants' Supplemental Exhibits, Vol. 1, Exhibits GG and JJ).

29. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 21 over a white candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

30. As regards H.D. 22, Tilling's notes indicate that he would "create as close to a majority-minority district as possible" and "avoid Bexley and Whitehall, which are mostly white areas." (Tilling Notes on H.D. 22).

31. As configured in Amendment D, H.D. 22 contains a population of 110,848 consisting of the following political subdivisions:

Franklin County, OH

02 Columbus City—
First Ward—
Second Ward—
Thirty-fifth Ward—
Third Ward—
Fourth Ward—
Fiftieth Ward—
Fifty-first Ward—
Fifty-fifth Ward—
Fifth Ward—
Twenty-seventh Ward—

25096027A Precinct A
25096027B Precinct B
25096027C Precinct C
25096027F Precinct F
25096027G Precinct G
25096027H Precinct H

25096027I Precinct I
25096027J Precinct J
25096027K Precinct K
25096027M Precinct M

Twenty-eighth Ward—
Forty-fourth Ward—
Forty-seventh Ward—
Forty-eighth Ward—
Madison Township, Precinct O—Portion on the inside of I-270

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

32. As H.D. 22 is configured in Amendment D, blacks are 44.68% of the total population. The black voting age population of H.D. 22 is 40.98%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

33. H.D. 22 is bordered by H.D. 21 on the north, H.D. 23 on the south and west, H.D. 24 on the south and east, and H.D. 25 on the north and east.

34. Madison Township,[m] part of which is in H.D. 22, consists of geographically non-contiguous sections. (TR-2, p. 232; Tilling Report, ¶ 37c; Plaintiffs' Exhibit 1, Defendants' Supplemental Exhibit MM).

35. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 22 over a white candidate. (Defendants' Supplemental Exhibits, Vol. 1, Exhibits GG and JJ).

36. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 22 over another black candidate and a white candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

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[m] Paintiffs' expert, Dr. Gordon Henderson, criticized this District for containing only one precinct of *Hamilton* Township. However, it appears to the me that this is an error and that Henderson intended to refer to the split of Madison Township. (TR-2, pp. 129-130).

37. Plaintiffs have challenged House Districts 30 and 31 in Hamilton County.[n]

38. As regards H.D. 30, Tilling's notes indicate that he would "start[] with majority-minority districts" and "includ[e] the greatest portion of the eastern segment of black population." (Tilling Notes on H.D. 30).

39. As configured in Amendment D, H.D. 30 contains a population of 108,885 consisting of the following political subdivisions:

Hamilton County, OH

03 Cincinnati City—
Thirteenth Ward—
Fifteenth Ward—
Seventh Ward—
Fourteenth Ward—
Second Ward—

3108652A Precinct A
3108652B Precinct B
3108652C Precinct C
3108652D Precinct D
3108652E Precinct E
3108652F Precinct F
3108652G Precinct G
3108652H Precinct H
3108652I Precinct I
3108652L Precinct L
3108652M Precinct M
3108652P Precinct P
3108652R Precinct R
3108652T Precinct T
3108652U Precinct U

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[n] A map of the Hamilton County House Districts, including District 30 and District 31, is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit W. A map showing the political subdivision boundaries is found in the same Volume at Exhibit II.

3108652V Precinct V
3108652W Precinct W

Third Ward—

15 St. Bernard City—

24 Columbia Township—

(No Wards)

31M020B Precinct B
31M020C Precinct C
31M020D Precinct D
31M020E Precinct E

27 Elmwood Township—

30 Golf Manor Township—

39 Springfield Township—

(No Wards)

31M075DD Precinct DD

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

40. As H.D. 30 configured in Amendment D, blacks are 55.98% of the total population. The black voting age population of H.D. 30 is 52.72%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

41. H.D. 30 is bordered by H.D. 36 on the north and east, H.D. 31 and H.D. 21 on the west, and H.D. 37 on the south.

42. In H.D. 30, Columbia and Springfield Townships both consist of geographically non-contiguous sections. (TR-2, p. 235; Tilling Report ¶ 37d; Plaintiffs' Exhibits 6 and 7; Defendants' Supplemental Exhibit NN).

43. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 30 over two white candidates. (Defendants' Supplemental Exhibits, Vol. I, Exhibits GG and JJ).

44. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 30 over another black candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

45. As regards H.D. 31, Tilling's notes indicate that he would "draw [a] second major-minority district, using areas of black population." (Tilling Notes on H.D. 30).

46. As configured in Amendment D, H.D. 31 contains a population of 105,573 consisting of the following political subdivisions:

Hamilton County, OH

03 Cincinnati City—
Twenty-third Ward—
Twenty-second Ward —
Tenth Ward
Eleventh Ward—
Twelfth Ward—
Sixteenth Ward—
Seventeenth Ward—
Eighteenth Ward—
Sixth Ward—
Eighth Ward—
Ninth Ward—

39 Springfield Township—

(No Wards)

31M075L Precinct L

(Defendants' Supplemental Exhibits, Vol. I, Exhibits C).

47. As H.D. 31 is configured in Amendment D, blacks are 49.16% of the total population. The black voting age population of H.D. 31 is 43.13%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

48. H.D. 31 is bordered by H.D. 35 on the north, H.D. 33 and H.D. 34 on the west, and H.D. 30, H.D. 32, and H.D. 37 on the east.

49. Springfield Township, partially in H.D. 31, consists of geographically non-contiguous sections. (TR-2, p. 234-235; Plaintiffs' Exhibits 6 and 7; Defendants' Supplemental Exhibit NN).

50. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 31 over two white candidates. (Defendants' Supplemental Exhibits, Vol. I, Exhibit GG and JJ).

51. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 31 over another black candidate and a white candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

52. Plaintiffs have challenged House Districts 38 and 39 in Montgomery County.°

53. As regards H.D. 38, Tilling's notes state that he woud create a "majority-minority district[.]" (Tilling Notes on H.D. 38).

54. As configured in Amendment D, H.D. 38 contains a population of 106,899 consisting of the following political subdivisions:

Montgomery County, OH

02 Dayton City—
Tenth Ward—
Eleventh Ward—
First Ward—
Fifth Ward—

5711105A Precinct A
5711105B Precinct B
5711105D Precinct D
5711105F Precinct F

° A map of the Montgomery County House Districts, including District 38 and District 39, is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit Y. A map showing the political subdivision boundaries is found in the same Volume at Exhibit II.

5711105G Precinct G
5711105I Precinct I

Sixth Ward—
Seventh Ward—
Eighth Ward—
Twelfth Ward—
Thirteenth Ward—
Fourteenth Ward—
Fifteenth Ward—

57111015A Precinct A
57111015B Precinct B
57111015C Precinct C
57111015D Precinct D
57111015E Precinct E
57111015F Precinct F
57111015G Precinct G
57111015H030537 Precinct H
57111015H030636 Precinct H
57111015I030636 Precinct I

Nineteenth Ward—
Twentieth Ward—

18 Jefferson Township

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

55. As H.D. 38 is configured in Amendment D, blacks are 44.47% of the total population. The black voting age population of H.D. 38 is 41.56%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

56. H.D. 38 is bordered by H.D. 39 on the north and east, H.D. 40 on the west, H.D. 41 on the south, and H.D. 42 on the east.

57. In H.D. 38, the boundary lines are partially coterminous with the municipal boundaries of the City of Dayton. (TR-2, p. 238; Tilling Report, ¶ 37e; Plaintiffs' Exhibit 2).

58. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed

in H.D. 38 over a white candidate. (Defendants' Supplemental Exhibits, Vol. I, Exhibit GG and JJ).

59. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 38 over another black candidate and a white candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

60. As regards H.D. 39, Tilling's notes state that he would "create an influence district with the highest possible minority vote" and that he would "[t]ake in Madison [Township], Trotwood, [and] portions of Harrison [Township]." (Tilling Notes on H.D. 39)).

61. As configured in Amendment D, H.D. 39 contains a population of 107,079 consisting of the following political subdivisions:

Montgomery County, OH

02 Dayton City—
Third Ward—

5711103A Precinct A
5711103B030539 Precinct B
5711103C Precinct C
5711103D Precinct D
5711103E Precinct E
5711103F030540 Precinct F
5711103F030639 Precinct F
5711103G Precinct G
5711103H Precinct H
5711103I Precinct I
5711103J Precinct J
5711103K Precinct K
5711103L Precinct L
5711103M Precinct M
5711103N030540 Precinct N
5711103N030639 Precinct N
5711103O Precinct O
5711103P Precinct P

Fourth Ward—
Fifth Ward—

5711105C Precinct C
5711105E Precinct E
5711105H Precinct H

Fifteenth Ward—

571110151030537 Precinct I

Sixteenth Ward—
Seventeenth Ward—
Eighteenth Ward—
Twenty-first Ward—
Twenty-second Ward—

10 Trotwood City—
19 Madison Township—
20 Mad River Township—

(No Wards)

57M045B Precinct B
57M045E Precinct E
57M045F Precinct F
57M045K Precinct K
57M045S Precinct S
57M045T Precinct T
57M045U Precinct U
57M045W Precinct W

Harrison Township, Precinct C—Only the non-contiguous portion to East

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

62. As H.D. 39 is configured in Amendment D, blacks are 40.69% of the total population. The black voting age population of H.D. 39 is 36.71%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

63. H.D. 39 is bordered by H.D. 43 on the north, H.D. 40 on the north and west, and H.D. 38 and H.D. 42 on the south.

64. Some wards in H.D. 39 exists as non-contiguous portions of the City of Dayton. (TR-2, pp. 239-240; Tilling Report ¶ 37e; Plaintiffs' Exhibit 2).

65. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 39 over another black candidate. (Defendants' Supplemental Exhibits, Vol. I, Exhibits GG and JJ).

66. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 39 over a white candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

67. Plaintiffs have challenged House District 44 in Summit County.[p]

68. As regards H.D. 44, Tilling's notes indicate that he would "try to maximize the minority voters in [Representative Vernon Sykes'] district," including the "city of Akron, Wards 2, 3, 5 and parts of 1, 4, and 10." (Tilling Notes on H.D. 44).

69. As configured in Amendment D, H.D. 44 contains a population of 104,538 consisting of the following political subdivisions:

Summit County, OH

01 Akron City—
Tenth Ward—
First Ward—

7700351A Precinct A
7700351B Precinct B
7700351C Precinct C
7700351D Precinct D
7700351E Precinct E
7700351G Precinct G

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[p] A map of the Summit County House Districts, including District 44, is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit AA. A map showing the political subdivision boundaries is found in the same Volume at Exhibit II.

7700351H Precinct H
7700351I Precinct I
7700351L Precinct L
7700351M Precinct M
7700351O Precinct O
7700351P42 Precinct P
7700351P44 Precinct P
7700351Q Precinct Q
7700351R Precinct R
7700351S Precinct S
7700351T Precinct T
7700351U Precinct U
7700351V Precinct V
7700351W Precinct W
7700351X Precinct X
7700351Y42 Precinct Y
7700351Y44 Precinct Y

Second Ward—
Third Ward—
Fourth Ward—

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

70. As H.D. 44 is configured in Amendment D, blacks are 43.07% of the total population. The black voting age population of H.D. 44 is 39.86%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

71. H.D. 44 is borded by H.D. 46 on the north, H.D. 45 on the west, H.D. 47 on the south, and H.D. 48 on the east.

72. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 44 over a white candidate. (Defendants' Supplemental Exhibits, Vol. I, Exhibits GG and JJ).

73. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 44 over a white candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

74. Plaintiffs have challenged House District 49 in Lucas County.[q]

75. As regards H.D. 49, Tilling's notes state that he would "[d]raw minority district first, based upon minority population distribution display" and that he would "follow[] the black population concentration to Ward 6 [and] . . . then . . . add Hispanic voters." (Tilling Notes on H.D. 49).

76. As configured in Amendment D, H.D. 49 contains a population of 105,798 consisting of the following political subdivisions:

Lucas County, OH

04 Toledo City—
Second Ward—

4842652K Precinct K
4842652L Precinct L

Fourth Ward—
Sixth Ward—
Tenth Ward—
Eighth Ward—
Thirteenth Ward—
Fourteenth Ward—
Seventeenth Ward—

(Defendants' Supplemental Exhibits, Vol. I, Exhibit C).

77. As H.D. 49 is configured in Amendment D, blacks are 49.99% of the total population. The black voting age population of H.D. 49 is 46.42%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

78. H.D. 49 is bordered by H.D. 50 on the north and east, and H.D. 52 on the south and west.

---

[q] A map of the Lucas County House Districts, including District 49, is found at Defendants' Supplemental Exhibits, Vol. I, Exhibit CC. A map showing the political subdivision boundaries is found in the same Volume at Exhibit II.

79. In the November 3, 1992 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 49 over a white candidate. (Defendants' Supplemental Exhibits, Vol. I, Exhibits GG and JJ).

80. In the November 8, 1994 general election, conducted under Amendment D, a black Democrat prevailed in H.D. 49 over another black candidate. (Defendants' Supplemental Exhibits, Vol. I., Exhibits KK and LL).

81. Given the percentage of black population in the eight challenged districts, i.e., 54.30% (H.D. 21), 44.68% (H.D. 22), 55.98% (H.D. 30), 49.16% (H.D. 31), 44.47% (H.D. 38), 40.69% (H.D. 39), 43.07% (H.D. 44), and 49.99% (H.D. 49), the average percentage of black population in those districts is 47.79%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

82. Given the percentage of black voting age population in the eight challenged districts, i.e., 48.30% (H.D. 21), 40.98% (H.D. 22), 52.72% (H.D. 30), 43.13% (H.D. 31), 41.56% (H.D. 38), 36.71% (H.D. 39), 39.86% (H.D. 44), and 46.42% (H.D. 49), the average percentage of black voting age population in those districts is 43.71%. (Defendants' Supplemental Exhibits, Vol. I, Exhibit DD).

83. There was one more minority representative and one more minority senator elected in 1992 under Amendment D than had last been elected under the 1981 Apportionment Plan, for a total of fifteen, as compared to thirteen, minority legislators. (TR-2, p. 256).

84. In the 1994 election, the same number of minority representatives was elected plus one additional senator, for a total of sixteen minority legislators. (TR-2, p. 260).

APPENDIX E

[Filed Oct. 16, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GERGE V. VOINOVICH, *et al.*,
Defendants.

Judge Nathaniel R. Jones
Judge Karen Nelson Moore
Judge David D. Dowd, Jr.

NOTICE OF APPEAL

Notice is given that Plaintiffs in the above-captioned action appeal to the Supreme Court of the United States from the Opinion of the Court filed August 22, 1997, docket number 375.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

/s/ Paul G. Hallinan
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APPENDIX F

CONSTITUTIONAL PROVISION

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged

in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTORY PROVISIONS

28 U.S.C. § 1253

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

(June 25, 1948, c. 646, 62 Stat. 928.)

28 U.S.C. § 2284

§ 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

> (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules ~~of~~ civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

(June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub.L. 86-507, § 1(19), 74 Stat. 201; Aug. 12, 1976, Pub.L. 94-381, § 3, 90 Stat. 1119; Nov. 8, 1984, Pub.L. 98-620, Title IV, § 402(29)(E), 98 Stat. 3359.)

42 U.S.C. § 1973

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race

or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(Pub.L. 89-110, Title I, § 2, Aug. 6, 1965, 79 Stat. 437, redesignated Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314, and amended Pub.L. 94-73, Title II, § 206, Aug. 6, 1975, 89 Stat. 402; Pub.L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

OHIO CONSTITUTION

ARTICLE XI: APPORTIONMENT

§ 1 Persons responsible for apportionment of state for members of general assembly.

The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.

Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representative districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year one thousand nine hundred seventy-one and every tenth year thereafter. The governor shall give such persons two weeks advance notice of the date, time, and place of such meeting.

The governor shall cause the apportionment to be published no later than October 5 of the year in which it is made, in such manner as provided by law.

§ 2 Method of apportionment of state for members of general assembly.

The apportionment of this state for members of the general assembly shall be made in the following manner: The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and the quotient shall be the ratio of representation in the house of representa-

tives for ten years next succeeding such apportionment. The whole population of the state as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "thirty-three" and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment.

§ 3 Population of each house of representatives district.

The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article.

§ 4 Population of each senate district.

The population of each senate district shall be substantially equal to the ratio of representation in the senate, as provided in section 2 of this Article, and in no event shall any senate district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the senate as determined pursuant to this Article.

§ 5 Representation.

Each house of representatives district shall be entitled to a single representative in each General Assembly. Every senate district shall be entitled to a single senator in each General Assembly.

§ 6 Creation of district boundaries; change at end of decennial period.

District boundaries established pursuant to this Article shall not be changed until the ensuing federal decennial census and the ensuing apportionment or as provided in section 13 of this Article, notwithstanding the fact that boundaries of political subdivisions or city wards within the district may be changed during that time. District boundaries shall be created by using the boundaries of political subdivisions and city wards as they exist at the time of the federal decennial census on which the apportionment is based, or such other basis as the general assembly has directed.

§ 6a Repealed Nov. 7, 1967, SJR 24, 107th General Assembly.

§ 7 Boundary lines of house of representatives districts.

(A) Every house of representatives district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line. To the extent consistent with the requirements of section 3 of this Article, the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties.

(B) Where the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards.

(C) Where the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in division (B) of this section, only one such unit may be divided between two districts, giving preference in the selection of a unit for divi-

sion to a township, a city ward, a city, and a village in the order named.

(D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article.

§ 8 Determination of number of house of representatives districts within each county.

A county having at least one house of representatives ratio of representation shall have as many house of representatives districts wholly within the boundaries of the county as it has whole ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining house of representatives district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation for the house of representatives determined under section 2 of this Article.

§ 9 When population of county is fraction of ratio of representation.

In those instances where the population of a county is not less than ninety per cent nor more than one hundred ten per cent of the ratio of representation in the house of representatives, reasonable effort shall be made to create a house of representatives district consisting of the whole county.

§ 10 Creation and numbering of house of representatives districts.

The standards prescribed in sections 3, 7, 8, and 9 of this Article shall govern the estabishment of house of representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:

(A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio shall be designated a representative district.

(B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratios may be designated a representative district.

(C) Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house of representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.

(D) The remaining territory of the state shall be combined into representative districts.

§ 11 Senate districts.

Senate districts shall be composed of three contiguous house of representatives districts. A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation in the senate determined under section 2 of this Article.

Senate districts shall be numbered from one through thirty-three and as provided in section 12 of this Article

§ 12 Change in boundaries of senate districts.

At any time the boundaries of senate districts are changed in any plan of apportionment made pursuant to any provision of this Article, a senator whose term will not expire within two years of the time the plan of apportionment is made shall represent, for the remainder of the term for which he was elected, the senate district which contains the largest portion of the population of the district from which he was elected, and the district shall be given the number of the district from which the senator was elected. If more than one senator whose term will not so expire would represent the same district by following the provisions of this section, the persons responsible for apportionment, by a majority of their number, shall designate which senator shall represent the district and shall designate which district the other senator or senators shall represent for the balance of their term or terms.

§ 13 Jurisdiction of supreme court, effect of determination of unconstitutionality; apportionment.

The supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this Article. In the event that any section of this Constitution relating to apportionment or any plan of apportionment made by the persons responsible for apportionment, by a majority of their number, is determined to be invalid by either the supreme court of Ohio, or the supreme court of the United States, then notwithstanding any other provisions of this Constitution, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment in conformity with such provisions of this Constitution as are then valid, including establishing terms of office and election of members of the general assembly from districts designated in the plan,

to be used until the next regular apportionment in conformity with such provisions of this Constitution as are then valid.

Notwithstanding any provision of this Constitution or any law regarding the residence of senators and representatives, a plan of apportionment made pursuant to this section shall allow thirty days for persons to change residence in order to be eligible for election.

The governor shall give the persons responsible for apportionment two weeks advance written notice of the date, time, and place of any meeting held pursuant to this section.

§ 14 District boundaries until January 1, 1973.

The boundaries of house of representatives districts and senate districts from which representatives and senators were elected to the 107th general assembly shall be the boundaries of house of representatives and senate districts until January 1, 1973, and representatives and senators elected in the general election in 1966 shall hold office for the terms to which they were elected. In the event all or any part of this apportionment plan is held invalid prior to the general election in the year 1970, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment to be effective until January 1, 1973, in accordance with section 13 of this Article.

§ 15 Severability provision.

The various provisions of this Article XI are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions.

Supreme Court, U.S.
FILED
FEB 11 1998
OFFICE OF THE CLERK

No. 97-988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BARNEY QUILTER, *et al.*,
Appellants,

v.

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

In this case, the majority of the three-judge federal district court, acting on remand from this Court, held that the 1991 reapportionment of the Ohio General Assembly did not violate the Equal Protection Clause of the Fourteenth Amendment. The questions presented on this appeal are:

1. Did the district court properly rule that strict scrutiny was not triggered to review the 1991 reapportionment of the Ohio General Assembly because Plaintiffs-Appellants failed to establish that race was the predominant factor motivating Defendants-Appellees' drawing of district lines?

2. Did the district court properly conclude that Plaintiffs-Appellants lacked standing to challenge four Ohio House Districts because none of them resided in those districts?

LISTING OF ADDITIONAL PARTIES

Appellants

THOMAS E. FERGUSON, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, TYRONE RILEY, RICHARD CORDRAY, PAUL MECHLING, RONALD GERBERRY, Representative of the 65th Ohio House District, MARY ABEL, and WILLIAM MALLORY.

Appellees

STANLEY J. ARONOFF, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Secretary to the Apportioning Persons.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-988

BARNEY QUILTER, *et al.*,
Appellants,

v.

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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MOTION TO AFFIRM

This is the third time that this litigation, which is now in its seventh year, has been before this Court. Following this Court's second remand, the district court correctly applied the principles laid down by this Court's decisions and rejected the Plaintiffs-Appellants' challenge to the 1991 redistricting of the Ohio General Assembly. That decision of the court below presents no issue worthy of plenary review. The judgment of the district court should, therefore, be summarily affirmed, and this lengthy litigation brought, at last, to an end.

STATEMENT OF THE CASE

Pursuant to Article XI, § 1 of the Ohio Constitution, the Ohio Apportionment Board [1] convenes every ten years

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[1] The Ohio Constitution does not actually create an "Apportionment Board," but rather provides that the Governor, Secretary of

in the year following the decennial census. Ohio Const., Art. XI, § 1; App. at 246a. The 1991 Apportionment Board, consisting of Defendants-Appellees Governor George V. Voinovich, Secretary of State Robert A. Taft, Jr., and then Ohio Senate President Stanley J. Aronoff, and two of the Plaintiffs-Appellants, then Auditor of State Thomas E. Ferguson and then Speaker Pro Tempore of the Ohio House of Representatives Barney Quilter, convened on August 22, 1991. D. 147, Ex. A at 1, 4. The "tortuous history," see *Quilter X*, 981 F. Supp. at 1035, App. at 2a, of the litigation challenging the 1991 Apportionment Board's actions now spans nearly 6½ years since this first meeting of the Board.[2]

State, Auditor of State, and two persons chosen by the legislative leaders "shall be the persons responsible for the apportionment of this state for members of the general assembly." Ohio Const., Art. XI, § 1. For ease of reference, these apportioning persons will hereinafter be referred to as the "Apportionment Board" or the "Board."

[2] To avoid some of the confusion resulting from this "tortuous history," Appellees will refer throughout this Motion to the numerous decisions of the district court as follows:

Quilter I	*Quilter v. Voinovich*, 794 F.Supp. 695 (N.D. Ohio Jan. 31, 1992)
Quilter II	*Quilter v. Voinovich*, 794 F.Supp. 756 (N.D.Ohio March 10, 1992)
Quilter III	*Quilter v. Voinovich*, No. 5:91CV-2219, 1992 WL 677145 (N.D.Ohio March 19, 1992)
Quilter IV	*Quilter v. Voinovich*, 794 F.Supp. 760 (N.D.Ohio May 5, 1992)
Quilter V	*Quilter v. Voinovich*, 857 F.Supp. 579 (N.D.Ohio March 31, 1994)
Quilter VI	*Quilter v. Voinovich*, 157 F.R.D. 36 (N.D.Ohio March 31, 1994)
Quilter VII	*Quilter v. Voinovich*, 5:91CV-2219, App. 160a (N.D. Ohio April 28, 1995)
Quilter VIII	*Quilter v. Voinovich*, 5:91CV-2219, 1995 WL 681182, App. 113a (N.D.Ohio May 26, 1995)
Quilter IX	*Quilter v. Voinovich*, 912 F.Supp. 1006, App. 63a (N.D.Ohio Aug. 11, 1995)
Quilter X	*Quilter v. Voinovich*, 981 F.Supp. 1032, App. 1a (N.D.Ohio Aug. 22, 1997)

At the initial meeting, the Board elected Governor Voinovich as its Chairman, D. 123 at 8, and appointed Defendant-Appellee James R. Tilling, the then Chief Executive Officer of the Ohio Senate, as its Secretary. D. 147, Ex. A at 2. Following the initial meeting, Voinovich, Taft, and Aronoff directed Tilling to draft and submit a plan on behalf of the majority members of the Apportionment Board. D. 154, Ex. 15 at 90; D. 75 at 11; D. 102 at 11; D. 123 at 7-8. Tilling was directed to submit a plan that complied with the Ohio Constitution, the United States Constitution, and the Voting Rights Act, 42 U.S.C. § 1973 *et seq.* D. 154, Ex. 15 at 90; D. 75 at 13; D. 123 at 9. The majority members of the Board stressed to Tilling that the preservation of county and political subdivision boundaries was an important goal in drafting the plan. D. 154, Ex. 15 at 91-92.

Tilling submitted his plan, *which contained nine majority-minority districts,* to the Board on September 26, 1991. On October 1, 1991, after consultations with groups representing the minority community in Cuyahoga County, the Board amended and adopted the Tilling plan. D. 154, Ex. 16 at 2-12, 29-32. The Board reconvened on October 3, 1991, to make several technical amendments to the plan, and the plan adopted on October 3, 1991, was labeled as "Amendment C." D. 154, Ex. 17 at 9-14. *Amendment C contained only eight majority-minority house districts.*

On November 1, 1991, Plaintiffs-Appellants commenced this action in the district court alleging violations of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution. D. 1.[3] On January 31, 1992, the district court issued its

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[3] In their Jurisdictional Statement, Appellants falsely asserted that their complaint alleged "that the Board's conscious use of race in redistricting violated the Voting Rights Act . . ., and the Fourteenth and Fifteenth Amendments to the United States

Opinion and Order, declaring that Amendment C violated § 2 of the Voting Rights Act because the Board had failed to justify the inclusion in the plan of several majority-minority districts. *Quilter I*, 794 F. Supp. at 700-01.[4] The district court majority remanded Amendment C to the Board with instructions to justify the majority-minority districts included in the plan. *Quilter I*, 794 F. Supp. at 701-02.

On February 14, 1992, the Ohio Supreme Court issued its decision upholding Amendment C against state constitutional attacks, *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992), and a majority of the Court directed the Board to make technical corrections to the plan, *Id.* at 202, 205, 214. On February 18, 1992, the Board reconvened and made these corrections, D. 147, Ex. C at 59; D. 147, Ex. A at 107, and the plan, as amended, was labeled "Amendment D." D. 147, Ex. A. at 107. Also, on February 18, 1992, the Board adopted "Findings and Conclusions," which, in the view of a majority of the Board, complied with the district court's order to "justify"

Constitution." Jurisdictional Statement at 4. As this Court noted in its decision in *Voinovich v. Quilter*, 507 U.S. 146 (1993), however, Appellants challenged not the consideration of race, but rather *how* race was considered. 507 U.S. at 150 ("In [plaintiffs'] view, the plan should have created a larger number of 'influence' districts —districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice.") (citation omitted). It was only following this Court's remand in *Voinovich* and subsequent decision in *Shaw v. Reno*, 509 U.S. 630 (1993), that Appellants asserted that Appellees could not be race-conscious in crafting an apportionment plan.

[4] The district court expressly abstained on the Ohio Constitutional issues, noting that these issues were then pending before the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). *Quilter I*, 794 F.Supp. at 702. The district court has generally adhered to its initial decision to abstain on state constitutional issues. See *Quilter VII*, App. at 163a n.3; *Quilter IX*, 912 F.Supp at 1026, 1029-30 n.17, App. at 96a, 102a n.17; *Quilter X*, 981 F.Supp. at 1048 n.15, App. at 32a n.15.

the inclusion of majority-minority districts under both Amendment C and Amendment D. D. 147, Ex. A.[5]

As set forth in the Board's Findings and Conclusions. the technical corrections, which became Amendment D, resulted in *a reduction from eight to five majority-minority house districts*. D. 147, Ex. A at 108-09. Four of the five majority-minority districts contained in Amendment D are located in Cuyahoga County and have never been challenged by the Appellants herein. As explained by Tilling at the Apportionment Board meeting of February 11, 1992:

> The changes that are made in the urban counties result only from going into the plan and trying to remove splitting of more than one political subdivision between districts; nothing more, nothing less. * * * Representative Mallory, who came before this Board and asked that he not be given additional blacks, the plan that we passed by the Board on October the 1st, Representative Mallory had 59.3 percent black population. The current plan has 47.26. And again, I want to make it clear, because that is a very significant decrease, and you can look at it on the map and you'll see exactly what we're talking about. That is only a result of recombining political subdivisions, and there's no other motivation whatsoever. *But it points out, and I think you want to examine these numbers in real detail. It does illustrate what happens when you follow the Ohio Constitution, not the Voting Rights Act.*

D. 147, Ex. B at 84-87 (emphasis added).[6]

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[5] As the district court majority held in its August 22, 1997, decision at issue herein, "[t]he Board's (perhaps disproportionate) focus on racial considerations in [its] findings . . . is hardly surprising . . ." given that court's January 31, 1992, mandate to "justify" all of the majority-minority districts contained in the plan. *Quilter X*, 981 F.Supp. at 1048, n.14, App. at 31a n.14.

[6] The district court later recognized that Amendment D's technical corrections largely involved reuniting split political subdivisions. *Quilter IV*, 794 F.Supp. at 763. See D. 192; D. 313 at 4A-20A.

On March 10, 1992, the district court again ruled that Amendment D violated § 2 of the Voting Rights Act because the Board had failed to "justify" the five majority-minority districts contained therein. *Quilter II*, 794 F. Supp. at 757. The court also concluded that the plan violated the Fifteenth Amendment, *id.* at 757, and, in a subsequent opinion, the Fourteenth Amendment's one person-one vote requirement. *Quilter III*, 1992 WL 677145 at *10.

On March 2, 1993, this Court unanimously reversed. *Voinovich v. Quilter, supra.* With regard to § 2 of the Voting Rights Act, the Court found that the district court had improperly shifted the burden of proof to the apportioning officials to justify their creation of minority-controlled districts, which impermissibly interfered with the State's authortiy to apportion its own legislature. 507 U.S. at 155-56. The Court further concluded that even had the district court properly placed the burden of proof on Plaintiffs, they could not have proven a violation of § 2. 507 U.S. at 158. The Court also reversed the lower court's findings that Amendment D violated the Fourteenth and Fifteenth Amendments. 507 U.S. at 158-61. The Court remanded the case "only for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment." 507 U.S. at 152.

On remand, the district court unanimously ruled "that the Ohio reapportionment plan survives scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause . . .," *Quilter V*, 857 F. Supp. at 587, but nevertheless permitted the Appellants to file a second amended complaint challenging Amendment D under this Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993), and to assert, for the first time, that the Board's consideration of race as a factor was itself unlawful. *Quilter VI*, 157 F.R.D. at 37.[7]

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[7] This Court denied, without opinion, the Appellees' subsequent petition for a writ of mandamus directing the district court to limit

The case was tried on remand on November 16 and 17, 1994. Appellants' only witness on remand attempted, but failed, to establish that Appellees ignored the traditional districting principles embodied in Article XI of the Ohio Constitution.[8]

In an effort to show an improper racial motive, Appellants introduced as evidence Tilling's handwritten notes, which Appellants asserted established that he drew the "minority districts" first in each of Ohio's urban counties. D. 104, Ex. 120. Tilling, however, testified that his handwritten notes dealt with versions of the plan of apportionment that predated Amendment D and described his drafting of an apportionment plan that maximized the number of majority-minority districts. D. 312 at 335.

The plan referred to in Tilling's notes was never adopted by the Board and was never in effect for any election. As established by the transcripts of the Apportionment

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itself to the scope of the remand. *In re Voinovich*, 511 U.S. 1126 (1994).

[8] Specifically, Appellants sought to establish that Appellees failed to retain districts from the 1981 apportionment plan as required by Article XI, § 7(D), of the Ohio Constitution. See D. 347, Ex. 17. On cross-examination, however, Appellants' "expert" witness admitted that his suggestion that most districts should have been retained was "quite misleading," D. 311 at 119, and "flat out wrong." D. 311 at 127. Moreover, Appellants' purported "expert" acknowledged that to retain prior districts, one would have to consider ward and precinct boundary changes since 1980, but admitted that he had performed no analysis of such changes. D. 311 at 129. In fact, it was established at trial that because house districts must be drawn along ward and precinct lines, see Ohio Const., Article XI, §§ 6 & 7(C), App. at 248a-249a, and because there have been numerous alterations in these lines since 1981, "enormous changes [were] necessar[y]" in house and senate district lines. D. 312 at 231-32. See n.15, *infra*. Although Appellants purported "expert" also asserted that the Board had violated other provisions of Article XI and created bizarrely-shaped districts, Appellants abandoned these assertions on the most recent remand from this Court, see D. 374 at 88-89, and have not raised them in their Jurisdictional Statement herein.

Board meetings, the "model" plan first submitted by Tilling on September 26, 1991, was modified on numerous occasions: (1) at the September 30, 1991, Board meeting, D. 154, Ex. 15 at 107-18, (2) at the October 1, 1991, Board meeting, D. 154, Ex. 16 at 29-32, (3) at the October 3, 1991, Board meeting, D. 154, Ex. 17 at 9-15, and (4) at the February 18, 1992, Board meeting, where Amendment D was adopted. D. 147, Ex. C.

In his "model" plan, Tilling demonstrated that it was possible to create nine majority-minority house districts for the Ohio General Assembly. Yet, Amendment D contained only five such districts. Amendment D is the only plan that has ever been effective for an election in Ohio, and thus the handwritten notes are irrelevant.

Tilling affirmatively testified that the majority of the Apportionment Board instructed him to "draw a plan that was in comportment with the Ohio Constitution, the Fourteenth and Fifteenth Amendments of the United States Constitution and the Voting Rights Act." D. 312 at 208. Compliance with that instruction, Article XI, § 3's requirement of population equality, and the other requirements of the Ohio Constitution, were the predominant factors used in drafting Amendment D. D. 312 at 252-53.

On April 28, 1995, the district court ruled that eight (8) of ninety-nine (99) Ohio House districts "violate the Equal Protection Clause of the Fourteenth Amendment." *Quilter VII*, App. at 197a. The majority concluded that these eight districts, HD21, HD22, HD30, HD31, HD38, HD39, HD44, and HD49, had been racially gerrymandered "[b]ecause race was a substantial and motivating factor" in their creation. *Quilter VII*, App. at 193a. The court ordered Appellees to redraw the eight districts. *Quilter VII*, App. at 198a. Judge Dowd again dissented. *Quilter VII*, App. at 199a.

On May 26, 1995, the majority members of the district court's panel issued an order vacating the April 28, 1995,

decision, D. 325, and issued an amended decision with significant changes. *Quilter VIII*, App. at 113a. In the May 26, 1995, decision, the district court majority again found that race was "a substantial and motivating factor" in the creation of eight house districts. *Quilter VIII*, App. at 149a. In response to Judge Dowd's April 28, 1995, dissenting opinion, however, the majority abandoned its long-standing decision to abstain on state constitutional issues and found that the Board had violated Article XI, § 7(D) of the Ohio Constitution by not retaining more districts from the prior apportionment. *Quilter VIII*, App. at 154a-157a n.19.

On August 11, 1995, notwithstanding Appellees' prior perfection of their appeal to this Court, the district court once again vacated its opinion, and issued a new opinion "to incorporate in [its] Opinion relevant analysis from [this] Court's *Miller decision*." D. 341 at 2. See *Miller v. Johnson*, 515 U.S. 900 (1995).[9] In its April 28, 1995, and May 26, 1995, decisions, the majority of the district court expressly rejected the "predominant motivating factor" standard as the trigger for strict scrutiny. *Quilter VII*, App. at 174a-175a; *Quilter VIII*, App. at 128a-130a. In this new Opinion, however, the district court majority ruled for the first time that race *was* the "predominant" factor motivating the adoption of Amendment D, *Quilter IX*, 912 F. Supp. at 1027, App. at 97a, even though it did not find that Appellees had disregarded any traditional districting principle:

> [A] plaintiff may satisfy the predominant factor test and prove that traditional districting principles were subordinated to racial objectives not only when a state violates or abandons traditional districting prin-

[9] Interestingly, the district court majority did not incorporate in its opinion the relevant analysis from this Court's decision in *United States v. Hays*, 515 U.S. 737 (1995), which was decided on the same day as *Miller*. Under the *Hays* decision, Appellants lacked standing to challenge four of the eight house districts at issue here.

> ciples in favor of racial motivations but also when a state substantially complies with traditional districting principles and gives them less weight in the apportionment process than racial considerations.

Quilter IX, 912 F. Supp. at 1019, App. at 79a-80a (citation omitted). Indeed, the district court majority readily assumed that Amendment D complied with all traditional districting principles. *Quilter IX*, 912 F. Supp. at 1026, App. at 95a-96a.

On June 13, 1996, this Court issued its decisions in *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894 (1996), and *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996). On June 24, 1996, the Court issued the following order in the present litigation:

> The judgment is vacated and the case is remanded to the United States District Court for the Northern District of Ohio for further consideration in light of *Bush v. Vera*, 517 U.S. — (1996) and *Shaw v. Hunt*, 517 U.S. —— (1996).

Voinovich v. Quilter, 116 S. Ct. 2542 (1996).

The case was argued on remand before the district court without further evidence. D. 374. On August 22, 1997, the district court issued its decision upholding Amendment D. *Quilter X*, 981 F. Supp. at 1051, App. at 39a. Initially, the court unanimously ruled that Appellants lacked standing to challenge four of the eight house districts previously declared invalid in the court's three 1995 opinions. *Quilter X*, 981 F. Supp. at 1038, App. at 10a; *Quilter X*, 981 F. Supp. at 1051 n.1, App. at 39a n.1 (Jones, J., dissenting on other grounds).[10]

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[10] Specifically, the district court ruled that the Appellants lacked standing to challenge HD21, HD22, HD30, and HD38 because none of them resided in any of the districts. Significantly, none of the four remaining districts (HD31, HD39, HD44, and HD49) is a majority-minority district. D. 147, Ex. A at 108-09; *Quilter X*, 981 F.Supp. at 1048 n.13, App. at 30a n.13.

In addressing the merits of Appellants' equal protection claim, the district court majority, in restating the trigger for strict scrutiny, followed this Court's precedent in holding "that because the plaintiffs have failed to make a threshold showing that the defendants subordinated traditional districting principles to consideration of race, strict scrutiny of the challenged districts is not applicable." *Quilter X*, 981 F. Supp. at 1035, App. at 1a. Accordingly, the district court majority applied the "rational basis" level of Fourteenth Amendment scrutiny, and concluded that Amendment D did not violate the Equal Protection Clause. *Quilter X*, 981 F. Supp. at 1050-51, App. at 35a-38a.[11]

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

I. INTRODUCTION.

In an effort to convince this Court that this case raises substantial constitutional questions, Appellants suggest that plenary review is required to resolve purported confusion over whether compliance with traditional districting principles precludes the triggering of strict scrutiny. Appellees respectfully maintain that this case presents no such "confusion." [12] The district court majority concluded

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[11] In their Jurisdictional Statement, Appellants assert only that the district court erroneously failed to invoke strict scrutiny in this case. They do not challenge the district court's analysis under the "rational basis" level of scrutiny.

[12] Any "confusion" over the district court's decision has been created solely by Appellants' inaccurate description of the decision below. For example, Appellants assert that this case presents the "question of whether a districting plan is unconstitutional if race was the primary factor considered by the drafters, yet the challenged districts coincidentally are compact and adhere to other (but not all) traditional districting principles." Jurisdictional Statement at 8. Of course, the district court did not hold, or even suggest, that "race was the primary factor considered by the drafters" of Amendment D. Rather, the court below held, in clear and unmistakable

that race was not the predominant factor motivating the drawing of the four house districts at issue herein. That conclusion was grounded not only upon Amendment D's adherence to traditional districting principles, but also upon a lack of evidence suggesting that "[r]ace was the criterion that . . . could not be compromised . . . ." *Shaw v. Hunt*, 116 S. Ct. at 1901. See App. at 31a

In light of record evidence overwhelmingly supporting the district court's decision, plenary review of that decision is not warranted Such review could only mire this Court in a fruitless search for small scraps of evidence to support a claim that Plaintiffs have been unable to prove in over six years of litigation.

A majority of "[t]he District Court concluded that [the apportionment plan] did not subordinate traditional districting principles to race. That finding is subject to review for clear error." *Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2194 (1997) (citations omitted). Appellees maintain that the district court majority did not commit clear error—indeed, it did not commit *any* error —and this Court should, therefore, summarily affirm that court's decision.

II. THE DISTRICT COURT PROPERLY HELD THAT "RACE" WAS NOT THE PREDOMINANT FACTOR MOTIVATING THE DRAFTING OF OHIO HOUSE OF REPRESENTATIVES DISTRICTS 31, 39, 44, AND 49.

In *Shaw v. Reno, supra*, this Court concluded that plaintiffs challenging a redistricting scheme may state "a claim under the Equal Protection Clause by alleging that the [state] adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts

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terms, that the Plaintiffs had failed to show "that race was the *predominant* factor, the criterion that could not be compromised." *Quilter X*, 981 F.Supp. at 1048, App. at 31a (emphasis in original).

because of their race, and that the separation lacks sufficient justification." *Shaw v. Reno,* 509 U.S. at 658. The Court further held that consciousness or awareness of race when redistricting, in and of itself, does not violate the Equal Protection Clause of the Fourteenth Amendment:

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. * * * [W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territoy, or to maintain the integrity of political subdivisions.

Shaw v. Reno, 509 U.S. at 646 (citations omitted) (emphasis in original).

In *Miller v. Johnson, supra,* the Court clarified its decision in *Shaw v. Reno,* and held that the good faith of the state in redistricting must be presumed in the absence of a sufficient showing to the contrary:

> The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter into a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race *predominates* in the redistricting process. * * * The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that *race was the predominant factor motivating the legislature's decision* to place a significant number of voters

> within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."

Miller v. Johnson, 515 U.S. at 915-16 (citations omitted) (emphasis added).[13]

A year after its decision in *Miller*, this Court again cautioned lower courts against invalidating state districting plans simply because the drafters were conscious of race:

> Applying traditional equal protection principles in the voting-rights context is "a most delicate task," however, because a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts. The constitutional wrong

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[13] In a separate concurring opinion, Justice O'Connor stated:

> I understand the threshold standard the Court adopts—"that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations,"—to be a demanding one. *To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices.* Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind. * * *
>
> Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may have well been considered in the redistricting process.

Miller v. Johnson, 515 U.S. at 928-29 (O'Connor, J., concurring) (emphasis added) (citations omitted).

> occurs when race becomes the "dominant and controlling" consideration.

Shaw v. Hunt, 116 S. Ct. at 1900 (citations omitted).

> Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts. Electoral district lines are "facially race neutral," so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of "classifications based explicitly on race." For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were "subordinated" to race. By that, we mean that race must be "*the predominant* factor motivating the legisture's [redistricting] decision."

Bush v. Vera, 116 S.Ct. at 1951 (plurality opinion) (emphasis in original) (citations omitted).[14]

Within the framework of this Court's decisions in *Shaw v. Reno*, *Miller*, *Bush*, and *Shaw v. Hunt*, the district court properly determined that strict scrutiny was not triggered in this case. As this Court has itself previously acknowledged, the Appellees herein, in an effort to comply with the Voting Rights Act, considered race as one of many factors in drafting Amendment D. *Voinovich v. Quilter*, 507 U.S. at 159. But Appellees did not *sub-*

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[14] Justice O'Connor, who authored the Court's plurality opinion in *Bush v. Vera*, also filed a concurring opinion in which she stated:

> [S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply.

Bush v. Vera, 116 S.Ct. at 1969 (O'Connor, J., concurring) (emphasis in original) (citations omitted).

ordinate, disregard, compromise, or neglect any traditional districting principle in favor of racial considerations.[15]

Appellants offered no credible evidence that Amendment D was "race-based." Rather, Appellants established only a fact not in dispute, *i.e.*, that Tilling was conscious of the racial make-up of the districts he drew. Indeed, when Amendment D was adopted, Tilling explained in detail the effect Amendment D would have on the racial

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[15] Indeed, the Ohio Supreme Court concluded that "the plan," with the exception of technical errors, complied with the Ohio Constitution. *Voinovich v. Ferguson*, 63 Ohio St.3d at 200. As both the Supreme Court and the district court noted, Defendants corrected the technical errors and the corrections became Amendment D, see *Voinovich v. Quilter*, 507 U.S. at 151; *Quilter IV*, 794 F.Supp. at 763; *Quilter IX*, 912 F.Supp. at 1012, the only plan of apportionment adopted by the Appellees that has ever been used in an Ohio General Assembly election. Despite the district court's reluctance to accept the Ohio Supreme Court's decision as conclusive on this issue, see *Quilter X*, 981 F.Supp. at 1046-47, App. at 27a-29a, it nevertheless determined that "there is no evidence . . . to suggest that the defendants disregarded traditional districting principles at all, let alone 'utterly.'" *Quilter X*, 981 F.Supp. at 1049, App. at 34a.

The only such principle Appellants now weakly maintain was disregarded was the Ohio Constitution's instruction to retain prior districts where possible. Ohio Const., Art. XI, § 7(D); App. at 249a. The district court found it unnecessary to determine whether Appellees had complied with this provision because there was no evidence suggesting that any noncompliance that may have occurred was due to Appellees' consideration of race. *Quilter X*, 981 F.Supp. at 1048, App. at 32a. The district court majority also expressed doubt that any failure to comply with only one of more than a dozen state constitutional districting rules (if proven) could rise to a federal constitutional violation. *Quilter X*, 981 F.Supp. at 1048, App. at 31a.

In any event, Appellees conclusively demonstrated below that districts from the 1981 apportionment could not have been retained without violating a host of Article XI's other districting requirements. D. 350, Ex. A at 15-18. See n.7, *supra*. The Ohio Supreme Court has ruled that, when two or more provisions of Article XI are in conflict, the Apportionment Board alone has the discretion "to choose the proper course." *Voinovich v. Ferguson*, 63 Ohio St.3d at 200.

make-up of several districts, but noted that the result was required to achieve compliance with the Ohio Constitution. Tilling's comments, which bear repeating here, are excerpted in the margin.[16]

The Appellees' steadfast adherence to the requirements of Article XI of the Ohio Constitution conclusively demonstrates that it was Article XI, and not race, that "was the criterion that . . . could not be compromised." *Shaw*

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[16] Tilling stated:

> The changes that are made in the urban counties result only from going into the plan and trying to remove splitting of more than one political subdivision between districts; nothing more, nothing less. And I would point out—and I know that the counsel for the other side is aware of this because many of these examples were given to us in the deposition provided by Bob Dykes, and we found some in our analysis where we had essentially split more than one political subdivision between districts. And so in going back and correcting that—and that's what these maps and corresponding charts reflect—that's why this plan is labeled as it is. It is the plan adopted by the Apportionment Board on October the 3rd with these technical corrections, and they are entirely, with the exception of Marion County, changing ward boundaries to make only one split between districts. All right? That's all it is. There's no ulterior motive. There's no skulduggery involved here.
>
> * * * *
>
> Representative Mallory, who came before this Board and asked that he not be given additional blacks, the plan that we passed by the Board on October the 1st, Representative Mallory had 59.3 percent black population. The current plan has 47.26. And again, I want to make it clear, because that is a very significant decrease, and you can look at it on the map and you'll see exactly what we're talking about. That is only a result of recombining political subdivisions, and there's no other motivation whatsoever. *But it points out, and I think you want to examine these numbers in real detail. It does illustrate what happens when you follow the Ohio Constitution, not the Voting Rights Act.* There is a significant difference in minority population in some areas. And we would appreciate input from the minority community on this.

D. 147, Ex. B at 84-87 (emphasis added).

v. Hunt, 116 S.Ct. at 1901. Under no circumstances can race be considered to have been the "predominant factor" motivating the drawing of the four house districts at issue herein, *i.e.*, HD31, HD39, HD44, and HD49.

In support of their unwarranted assertion that race was "the predominant motivating factor" in drafting Amendment D, Appellants direct this Court's attention to only three items: (1) Tilling's handwritten notes recorded at the time he made his first draft of an apportionment plan, D. 104, Ex. 120, (2) the Board's Findings and Conclusions adopted following the district court's January 31, 1992, decision ordering the Board to "justify" Amendment C, D. 147, Ex. A, and (3) Chairman Robert T. Bennett's September 26, 1991, cover letter submitting the Ohio Republican Party's proposed apportionment plan to the Board for consideration. D. 107, Ex. 1; D, 149, Ex. 79. None of these items supports Appellants' assertion.

As to Tilling's notes, he testified at trial that the plan described in those notes was not the plan of apportionment now in effect for Ohio's General Assembly. D. 312 at 335. That plan was never adopted by the Board and was never in effect for any election. As established by the transcripts of the Apportionment Board meetings, the "model" plan first submitted by Tilling on September 26, 1991, was modified on numerous occasions.[17] Amendment

[17] As noted above, the plan described in Tilling's notes underwent extensive transformations: (1) at the September 30, 1991, Board meeting, D. 154, Ex. 15 at 107-18, (2) at the October 1, 1991, Board meeting, D. 154, Ex. 16 at 29-32, (3) at the October 3, 1991, Board meeting when Amendment C was adopted, D. 154, Ex. 17 at 9-15, and (4) at the February 18, 1992, Board meeting, when Amendment D was adopted. D. 147, Ex. C. As the court below long ago noted, " 'the technical corrections' were so extensive and pervasive that the resulting document [Amendment D] constituted a new plan . . . ." *Quilter IV*, 794 F.Supp. at 761-62. The attempt of the Appellants and the dissent below to characterize Tilling's initial model plan as "a not-too-distant forerunning of" Amendment D, *Quilter IX*, 912 F.Supp. at 1026, App. at 95a, and thereby elevate Tilling's notes to the status of "substantial direct evidence of race-based line drawing," Jurisdictional Statement at 3-4, is, therefore, completely unpersuasive.

D is the only plan that has ever been effective for an election in Ohio. Thus, the handwritten notes are not probative of the issues in this case.

To the extent Tilling's notes have any relevance, they establish that race was *not* "the predominant motivating factor" in drawing the districts contained *in Amendment D*. As Tilling explained at trial, he formulated his "model" plan to determine how many majority-minority districts could be created so that he could use that plan as a benchmark to judge all plans submitted to the Board. D. 312 at 335. Under this "model," Tilling created nine majority-minority districts, but Amendment D contains only five such districts. Furthermore, when the adoption of Amendment D reduced the number of minority districts to five, Tilling explained that the sole, *and uncontradicted*, reason for that adoption was to comply with the provisions of Article XI of the Ohio Constitution. D. 147, Ex. B at 87. This explanation establishes that the requirements of the Ohio Constitution predominated over race in drafting Amendment D. Thus, race was not "the predominant motivating factor" in the drafting of Amendment D. Unlike the North Carolina Congressional districts at issue in *Shaw v. Hunt*, it was the traditional districting principles embodied in Article XI of the Ohio Constitution, and not racial concerns, that "could not be compromised." *Shaw v. Hunt*, 116 S.Ct. at 1901.

As to the Board's Findings and Conclusions entered on February 18, 1992, D. 147, Ex. A, they were adopted by the Board only after it was ordered by the district court on January 31, 1992, to "justify" its inclusion of majority-minority districts in Amendment C. *Quilter I*, 794 F. Supp. at 701-02. The district court majority properly noted that "[t]he Board's (perhaps disproportionate) focus on racial considerations in those findings, therefore, is hardly surprising . . . ." *Quilter X*, 981 F. Supp. at 1048 n.14, App. at 31a n.14. Thus, the Board's actions lend no support for the argument that traditional districting principles were neglected or subordinated to the

Board's consideration of race. Rather, when considered as a whole, they establish the Board's belief that its plan complied with *both* the traditional districting principles embodied in Article XI of the Ohio Constitution and the requirements of federal law. See *Voinovich v. Quilter*, 507 U.S. at 159.

Finally, with respect to Robert Bennett's September 26, 1991, letter, the majortiy below properly observed that the letter was irrelevant:

> Robert T. Bennett, the chairman of the Ohio Republican Party, did submit a plan to the Board on behalf of the party, and made a statement at a Board hearing that was substantially similar to a letter attached to that plan stating that the plan sometimes departed from the Ohio Constitution's requirements in favor of Voting Rights Act considerations. We note, however, that the Republican Party plan submitted by Bennett, and on which he based his remarks, was one of five proposed apportionment plans submitted to the Board, and was rejected by the Board. The Republican members of the Board submitted their own plan (which was not the Republican Party plan), drafted by Tilling, which the Board adopted. Comments made by Bennett in reference to a rejected plan, therefore, appear to have no relevance to the motivations behind the plan adopted by the Board and now before this court.

Quilter X, 981 F. Supp. at 1047 n.12, App. at 29a-30a n.12 (citations omitted). Appellants' effort to use this letter as evidence of Appellees' racial motives, without any indication that it did not refer to Amendment D *or any plan submitted by Appellees*, see Jurisdictional Statement at 23 n.28, is thus blatantly misleading.[18]

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[18] The dissenting opinion below implied that Bennett submitted "*the* plan" to the Board and that the Bennett cover letter was attached to it. *Quilter X*, 981 F.Supp. at 1052, App. at 41a (Jones, J., dissenting) (emphasis added). In a lengthy footnote, the dissent implicitly acknowledged that the Tilling plan was *not* the same as

Amendment D stands in stark contrast to the Congressional districts invalidated by this Court in *Miller*, *Shaw v. Hunt*, and *Bush*. All of the districts challenged by Appellants are wholly located within a county. In fact, no district with a significant black population crosses a county boundary.

Moreover, every Ohio house district fully complies with the provisions of Article XI of the Ohio Constitution. They are compact and contiguous, see Article XI, § 7(A), App. at 248a; they are created using the boundaries of political subdivisions and wards, see Article XI, § 6, App. at 248; they comply with the population requirements of the Ohio and United States Constitutions,

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the plan submitted by the Ohio Republican Party, but attempted to bind the plans together by reference to a document entitled "Republican Opportunities." *Quilter X*, 981 F.Supp. at 1052-53 n.4, App. at 41a-43a n.4. See D. 103, Ex. 86; D. 113, Ex. 1. This Court has, however, previously rejected the district court's former reliance on this document (in *Quilter III*):

> Second, the District Court cited Tilling's possession of certain documents that, according to the court, were tantamount to "a road-map detailing how [one could] create a racial gerrymander." Apparently, the District Court believed that Tilling, a Republican, sought to minimize the Democratic Party's power by diluting minority voting strength. The District Court, however, failed to explain the nature of the documents. Contrary to the implication of the District Court opinion, the documents were not a set of Republican plans for diluting minority voting strength. In fact, they were not even created by Tilling or the Republicans. They were created by a Democrat who, concerned about possible Republican manipulation of apportionment, set out the various types of political gerrymandering in which he thought the Republicans might engage. That Tilling possessed documents in which the opposing party speculated that he might have a discriminatory strategy does not indicate that Tilling actually had such a strategy. And nothing in the record indicates that Tilling relied on the documents in preparing the plan.

Voinovich v. Quilter, 507 U.S. at 159-60 (citations omitted). The dissent's effort to rely upon this document once again is, therefore, directly at odds with this Court's earlier explanation of the document.

see Article XI, §§ 3 & 4, App. at 247a; and not more than one political subdivision is divided between two districts, see Article XI, § 7(C), App. at 248a-249a. See *Voinovich v. Ferguson*, 63 Ohio St. 3d at 200; *Quilter X*, 981 F. Supp. at 1049, App. at 34a.

Finally, it must be stressed that unlike the Georgia General Assembly in *Miller*, and the North Carolina General Assembly in *Shaw v. Hunt*, the Ohio Apportionment Board did *not* seek to maximize the number of majority-minority districts. Indeed, as demonstrated by the plan described in Tilling's handwritten notes, it was possible to create nine majority-minority house districts. Yet Amendment D, the only plan ever in effect for an election in Ohio, contained only five majority-minority districts. And only *one* of the eight districts at issue herein (and none of the four that Appellees have standing to challenge) is a majority-minority district.

In this regard, the districts at issue herein are similar to the Florida Senate District approved by this Court just last term:

> The district is located entirely in the Tampa Bay area, has an end-to-end distance no greater than that of most Florida Senate districts, and in shape does not stand out as different from numerous other Florida House and Senate districts. While District 21 crosses a body of water and encompasses portions of three counties, evidence submitted showed that both features are common characteristics of Florida legislative districts, being products of the State's geography and the fact that 40 Senate districts are superimposed on 67 counties.
>
> Addressing composition, the District Court found that the residents of District 21 "regard themselves as a community." Evidence indicated that District 21 comprises a predominantly urban, low-income population, the poorest of the nine districts in the Tampa Bay region and among the poorest districts in

> the State, whose white and black members alike share a similarly depressed economic condition, and interests that reflect it. The fact that District 21 under Plan 386 is not a majority black district, the black voting-age population being 36.2%, supports the District Court's finding that the district is not a "safe" one for black-preferred candidates, but one that "offers to any candidate, without regard to race, the opportunity" to seek and be elected to office.
>
> Based on these and other considerations, the District Court concluded that traditional districting principles had not been subordinated to race in drawing revised District 21.

Lawyer, 117 S. Ct. at 2194-95 (footnotes and citations omitted).[19] See also *Abrams v. Johnson*, 117 S. Ct. 1925, 1933 (1997) (approving a court drawn plan that was "consistent with Georgia's traditional districting principles, and considering race as a factor but not allowing it to

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[19] Amendment D is also much like the California redistricting plan upheld in *DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D.Cal. 1994), *aff'd in part, dismissed in part*, 515 U.S. 1170 (1995). In that case, the district court concluded "that in the context of redistricting, where race is considered only in applying traditional districting principles along with the requirements of the Voting Rights Act, . . . strict scrutiny is not required." 856 F.Supp. at 1415. See also *Harvell v. Blytheville School Dist. No. 5*, 126 F.3d 1038, 1041 (8th Cir. 1997) ("Strict scrutiny does not apply, however, merely because majority-minority districts were intentionally created or the district lines were drawn with consciousness of race. There is a distinction between 'being aware of racial considerations and being motivated by them,' and the awareness of race does not mean that it predominated in the redistricting process. Where traditional districting principles such as compactness, contiguity, and respect for political subdivisions or communities with actual shared interests have not been subordinated to race, there is no equal protection violation.") (citations omitted); *Theriot v. Parish of Jefferson*, 966 F.Supp. 1435, 1447 (E.D.La. 1997) ("While race, through the force of § 2 of the Voting Rights Act, provided the genesis for the majority-minority district, it did not dictate the eventual boundaries of District 3.")

predominate").[20] Drawing district lines that take into consideration the existence of concentrated minority populations in urban areas, while observing state constitutionally-mandated, race-neutral districting criteria, simply does not invoke strict scrutiny under the Fourteenth Amendment. This Court has never held otherwise.

From the foregoing, it is clear that race was not the predominant motivating factor used by the Board in drafting Amendment D. Thus, this Court should summarily affirm the decision of the district court.

III. PLAINTIFFS-APPELLANTS HAVE FAILED TO ESTABLISH ANY ERROR IN THE RULING BELOW THAT NONE OF THEM SUFFERED A COGNIZABLE INJURY UNDER THE FOURTEENTH AMENDMENT WITH REGARD TO FOUR OF THE EIGHT CHALLENGED DISTRICTS.

Appellants also assert that the district court erred by ruling that they lacked standing to challenge four of the eight districts at issue in this case. In so asserting, Appellants do not suggest that the district court misinterpreted or misapplied this Court's precedents, but rather, that this Court should "clarify" its decisions addressing standing to challenge state legislative redistricting determinations. Jurisdictional Statement at 24-25. Appellees respectfully maintain that there is no ambiguity in this Court's decision in *United States v. Hays, supra, Bush v. Vera, supra*, and *Shaw v. Hunt, supra*, and that this Court should, therefore, affirm the district court's determination

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[20] In *Abrams*, both the district court and this Court observed that:

> [i]f Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so.

Abrams, 117 S.Ct. at 1934 (citation omitted).

that Appellants lack standing to challenge HD21, HD22, HD30, and HD38.[21]

In *United States v. Hays*, this Court held that nonresidents of allegedly racially gerrymandered districts do not have standing under the Fourteenth Amendment to challenge those districts. *United States v. Hays*, 515 U.S. at 745. The Court further specifically ruled that even residents of adjoining districts do not have standing. Nonresidents of allegedly racially gerrymandered districts simply have not suffered "a cognizable injury under the Fourteenth Amendment." *Id.* at 746. Moreover, the Court concluded, the fact that plaintiffs sought to attack the redistricting plan as a whole was irrelevant to the standing analysis. Only those plaintiffs who live in an allegedly racially gerrymandered district have standing to challenge the validity of that district under the Fourteenth Amendment. *Id.*

In both *Shaw v. Hunt* and *Bush v. Vera*, this Court reaffirmed its conclusions in *Hays*. *Shaw v. Hunt*, 116 S.Ct. at 1900; *Bush v. Vera*, 116 S.Ct. at 1951. In *Shaw v. Hunt*, the Court expressly rejected the argument that Appellants make here, *i.e.*, that a plaintiff who resides in a challenged district has standing to challenge the entire districting plan:

> Two [plaintiffs] . . . live in District 12 and thus have standing to challenge that part of [the plan] which defines District 12. The remaining [plaintiffs] do not reside in District 1, however, and they have not provided specific evidence that they personally were assigned to their voting districts on the basis of race. Therefore, we conclude that only [the two plaintiffs] have standing *and only with respect to District 12*.

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[21] The unanimity of the decision below on the issue of standing itself belies Appellants' plea for further clarification of this Court's pronouncements on standing in legislative redistricting cases. For commentary recognizing the clarity of the *Hays* standing rule, see Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 Harv. L.Rev. 576, 580 n.20 (1997).

Shaw v. Hunt, 116 S.Ct. at 1900 (footnote and citations omitted) (emphasis added).

In the case at bar, none of the Appellants resides in HD21, HD22, HD30, or HD38, four of the districts challenged by Appellants.[22] Appellants offered no evidence of specific facts to support a finding that any of them were personally subjected to a racial classification with respect to those four districts. The district court, therefore, properly determined that Appellants lack standing to challenge the validity of HD 21, HD 22, HD30, and HD38.[23]

To avoid the clear holdings of *Hays*, *Bush*, and *Shaw v. Hunt*, Appellants assert that Plaintiffs-Appellants Quilter and Ferguson, dissenting members of the 1991 Apportionment Board, have standing to challenge the constitutionality of the plan. Incredibly, Appellants make this bold assertion by citing *Coleman v. Miller*, 307 U.S. 433 (1939), but without any reference to this Court's decision last term in *Raines v. Byrd*, 117 S.Ct. 2312 (1997). In *Raines*, this Court stated:

> It is obvious, then, that our holding in *Coleman* stands (at most . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.
>
> It should be equally obvious that appellees' claim does not fall within our holding in *Coleman*, as thus understood. They have not alleged that they voted for a specific bill, that there were sufficient votes to

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[22] Appellants do not question this finding.

[23] Significantly, there is no evidence in the record to suggest that the resolution of the merits of this case would be altered by addressing Appellants' claims on all eight of the challenged house districts. The district court's reasoning with respect to the four districts it addressed applies with equal force to the four districts that Appellants lacked standing to challenge.

> pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Line Item Veto Act, their votes were given full effect. They simply lost that vote. * * * *Coleman* thus provides little meaningful precedent for appellees' argument.

Id. at 2139-40 (citation and footnotes omitted).

In this case, like the legislators in *Raines*, Quilter's and Ferguson's votes on the Apportionment Board were not nullified, but were given full effect. They simply lost the vote adopting Amendment D. Accordingly, they have no standing to challenge the constitutionality of Amendment D.[24]

CONCLUSION

For the foregoing reasons, the judgment below should be summarily affirmed.

Respectfully submitted,

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Dated: February 11, 1998

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[24] Furthermore, under Article XI, § 1, of the Ohio Constitution, App. at 246a, the members of the Apportionment Board are defined by the offices they occupy, and Quilter and Ferguson no longer hold the offices of Speaker Pro Tempore of the Ohio House of Representatives and Auditor of State. They are, therefore, no longer members of the Ohio Apportionment Board.

Supreme Court, U.S.
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No. 97-988

IN THE
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OCTOBER TERM, 1997

BARNEY QUILTER, *et al.*,
Appellants,
v.
GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Contrary to Appellees' assertion at page 1 of their Motion to Affirm, this is actually the *fourth* time that this litigation has been before this Court. However, on each prior occasion it was the Appellees, not Appellants, who petitioned this Court to review and reverse the decisions rendered below.[1] Only now, after a newly constituted

[1] *First*, on March 11, March 25, April 1 and May 26, 1992, Appellees noticed their appeals of various decisions rendered by the District Court below. This Court delivered its opinion on those appeals on March 2, 1993. *Voinovich v. Quilter*, 507 U.S. 146, 113 S. Ct. 1149 (1993). *Second*, on April 20, 1994, Appellees unsuccessfully sought a writ of mandamus in response to the District Court's order granting Appellants' motion for leave to file a second amended complaint. *In re Voinovich*, 511 U.S. 1126, 114 S. Ct. 2156 (1994). *Third*, on August 17, 1995, Appellees noticed their appeal from the District Court's entry of judgment in favor of the Appellants. This Court subsequently remanded this action for reconsideration in light of its opinions issued in *Bush v. Vera*, 517 U.S. 952, 116

panel in the District Court (including one Judge who has never heard any evidence in this case) voted 2-1 to reverse the District Court's prior decision in Appellants' favor, do Appellees seek summary affirmance and cavalierly assert that this case "presents no issue worthy of plenary review." Motion to Affirm, p. 1.

The unsettled legal issues before the Court are no less worthy of its attention now than before, and are even more worthy due to the District Court's misguided creation and application of an erroneous legal standard in an important area of constitutional law.[2] The Appellees' Motion to Affirm therefore should be denied.

I. THE COURT SHOULD DENY APPELLEES' MOTION TO AFFIRM BECAUSE THE ISSUES PRESENTED TO AND NECESSARILY DECIDED BY THE DISTRICT COURT INVOLVE IMPORTANT AND UNRESOLVED QUESTIONS OF CONSTITUTIONAL LAW, NOT QUESTIONS OF FACT

Appellees' arguments are noteworthy for their nearly exclusive emphasis on Appellees' view of the underlying facts of this litigation. Given the current procedural posture, this emphasis is misplaced.

It is undisputed that, acting upon remand from this Court,[3] the District Court below did nothing more than

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S. Ct. 1941 (1996) and *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894 (1996) (*"Shaw II"*). *Voinovich v. Quilter*, —— U.S. ——, 116 S. Ct. 2542 (1996). *Fourth*, and finally, this appeal, the first by Appellants, was noticed to obtain review of the District Court's reversal of its prior decision, and the entry of judgment in Appellees' favor, on remand.

[2] Jurisdictional Statement, pp. 9-23. Appellees neither attempted to defend *nor even mentioned* the new legal standard crafted by the District Court, but instead limited their argument to a blanket assertion that the District Court "did not commit any error." Motion to Affirm, p. 12 (emphasis omitted). This surprising silence can only be interpreted as an implicit acknowledgment that the District Court's newly-created legal standard is not defensible.

[3] *Voinovich v. Quilter*, —— U.S. ——, 116 S. Ct. 2542 (1996).

reconsider its earlier decision (rendered in favor of Appellants) in view of this Court's decisions in *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996) and *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894 (1996) ("*Shaw II*"). The District Court considered no new evidence and limited its analysis to the legal questions presented:

> "Because we focus on application of the legal analysis outlined by the Supreme Court in recent cases, we will not revisit the facts and procedural history of this case in detail. . . . On remand, we have limited our consideration to the effect of *Bush* and *Shaw II* on our previous analysis and holding. We have not considered any new evidence; we therefore readopt our previous factual findings, as outlined in the vacated opinion, to the extent that they are findings of fact and not conclusions of law . . . and to the extent that they are relevant to the threshold analysis."

Quilter v. Voinovich, 981 F. Supp. 1032, 1035 (N.D. Ohio 1997), App. 1a at 1a-3a.

Moreover, the opinion below was authored by newly-appointed Circuit Judge Karen Nelson Moore, who was assigned to the panel only *after* the last evidentiary hearing in this case. As a result, Judge Moore heard no evidence in the case and relied instead upon the District Court's prior findings of fact.

Since the District Court reached two starkly different conclusions based upon the same set of facts, its change of position can be explained only in terms of the legal implications of this Court's decisions in *Bush* and *Shaw II*. Accordingly, in bringing this appeal, Appellants properly focused their arguments upon the District Court's interpretation and application of these decisions, not upon the facts. Jurisdictional Statement, pp. 17-23.

Appellees' misplaced emphasis on the facts of this case, and their conspicuous failure to address the District Court's newly-created legal standard, reveals the fatal flaw in their position: rather than argue that the District Court

should be summarily affirmed because it correctly decided the legal issues before it, Appellees insist that regardless of the District Court's (erroneous) interpretation of the law, this Court should summarily affirm its decision because Appellees believe they should win on the facts anyway.

This argument is unpersuasive not only because the facts were not contested in the proceedings on remand, but also because there is no reason to believe tha he facts necessarily dictate any result in Appellees' or when the proper legal standard is applied. Indeed, prior to this Court's decisions in *Shaw II* and *Bush*, it was the *Appellants* who prevailed on the facts [4]—and those facts have not changed since the last decision of the District Court was rendered before remand. As demonstrated by the District Court's contrary decision reached upon the *same set of facts after remand*, the dispositive issues before the Court go to the legal standards that should be applied to the facts, not to the facts themselves. If the District Court erred in applying its newly-created legal standard—and, remarkably, Appellees do not contest Appellants' arguments in this regard—then there is no guarantee that application of the correct legal standard will favor Appellees.

Thus, Appellees are *not* seeking a summary affirmance of the District Court's application of existing law to the facts of this case—the precise issue presented to and necessarily decided by that Court. Instead, they ask this Court to apply Appellees' generalized assessment of *Bush* and *Shaw II* to Appellees' view of the facts of this case, without briefing, oral argument or a written opinion, and to conclude that if the District Court had applied the correct legal standard (whatever that may be), then the Appellees would have prevailed.

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[4] *Quilter v. Voinovich*, 912 F. Supp. 1006 (N.D. Ohio 1995), App. 63a.

This Court should decline Appellees' invitation to determine and apply important and uncertain issues of constitutional law without briefing, oral argument, or an opinion explaining its decision. Given that both sides have prevailed at some point in the District Court based upon the same set of facts, it is apparent that it is this Court's opinions in *Bush* and *Shaw II*, rather than Appellees' revisionist rendition of the facts of this case, that should be dispositive. Accordingly, notwithstanding the limited precedent that would be set by a summary affirmance,[5] such an affirmance reasonably might be interpreted as concluding that the District Court correctly created and applied a new legal standard, because the "precise issue[] presented and necessarily decided", *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S. Ct. 2238, 2240 (1977), was the effect of this Court's decisions in *Bush* and *Shaw II*. The likelihood that a summary affirmance upon the facts will be misinterpreted in this manner by apportioning bodies, courts and commentators, warrants the denial of Appellees' Motion to Affirm.

II. RATHER THAN SUMMARILY AFFIRM THE DISTRICT COURT'S DECISION ON ISSUES OF STANDING, THIS COURT SHOULD ADDRESS APPELLANTS' STANDING ARGUMENTS AND CLARIFY THE RELATIONSHIP OF INJURY TO THE BRIGHT-LINE RULE ANNOUNCED IN *UNITED STATES v. HAYS*

Contrary to the Appellees' assertions,[6] Appellants have not attempted to avoid this Court's bright-line standing rule announced in *United States v. Hays*, 515 U.S. 737, 745, 115 S. Ct. 2431, 2436 (1995). Jurisdictional State-

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[5] "Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below." *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S. Ct. 2238, 2240 (1977). Summary affirmances do, however, "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided." *Id.*

[6] Motion to Affirm, p. 26.

ment p. 25. Instead, after acknowledging the existence of the bright-line standing rule, Appellants offered specific reasons why this Court should reconsider that rule and, in particular, why it should clarify the relationship between the bright-line rule and the constitutional injury that underlies standing in this area. *Id.* at 24-25.

Given the concern expressed by a number of commentators who have pointed out conceptual difficulties with the existing bright-line standing rule, *id.* at 25, reconsideration of this rule will provide this Court with an opportunity to clarify the theory behind it, and thereby to provide a conceptual framework for lower courts to apply when addressing new issues in the area of standing. Thus, the Court should decline Appellees' request for summary affirmance of the District Court's ruling in regard to issues of standing.

III. THE LEGAL AND FACTUAL ASSERTIONS IN APPELLEES' MOTION TO AFFIRM ARE UNRELIABLE

In the course of disposing of Appellees' Motion to Affirm, this Court should be aware that certain of the factual and legal statements in that Motion are inaccurate. The five items addressed below do not constitute a comprehensive listing of such errors, but they are indicative of the unreliable character of the Motion to Affirm.

First, Appellees claim that Appellants have "falsely asserted" that their original complaint alleged " 'that the Board's conscious use of race in redistricting violated the Voting Rights Act . . ., and the Fourteenth and Fifteenth Amendments to the United States Constitution.' " Motion to Affirm, p. 3 n.3 (quoting Jurisdictional Statement, p. 4). In fact, Appellants' original complaint did plead violations of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments of the United States Constitution, and it specifically alleged: "Under the pretense of complying with the Voting Rights Act, the Defendants drew legislative boundary lines *on a race-conscious basis* . . . ." D.1, ¶ 32 (emphasis added).

Thus, Appellants have objected to the Appellees' conscious use of race throughout this litigation, even though they did not amend their complaint to assert a *Shaw* claim until after that kind of claim was first articulated in this Court's decision in *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993).

Second, in regard to Appellees' insistence that Tilling's notes are irrelevant because his model plan was never adopted, Motion to Affirm, pp. 7-8, 18-19, the District Court below adopted findings of fact to the contrary.[7]

Third, in regard to Appellees' suggestion that the District Court issued its opinion on August 11, 1995 "notwithstanding Appellees' prior perfection of their appeal to this Court," Motion to Affirm, p. 9, this appeal was premature because the District Court had not yet entered final judgment. Jurisdictional Statement, p. 6. Thus, that appeal had not been properly "perfected."

Fourth, in regard to Appellees' argument that a decision issued by the Ohio Supreme Court conclusively proves that the challenged redistricting plan comports with the requirements of the Ohio Constitution, Motion to Affirm, pp. 4-5, 16 n.15, that Court's short *per curiam* opinion addressed only Senate District 32, which is not one of the districts challenged in this litigation. *Voinovich v. Ferguson*, 63 Ohio St. 3d 198, 200, 586 N.E.2d 1020, 1021 (1992). Indeed, the District Court expressly held that this Ohio Supreme Court opinion "neither precludes this court's consideration of the defendants' attention to traditional districting principles with regard to HD 31, HD 39, HD 44, and HD 49, nor mandates a particular finding by this court." *Quilter*, 981 F. Supp. at 1047, App. 1a at 29a.

Finally, in regard to Appellees' lengthy discussion of the so-called Bennett letter, Motion to Affirm, p. 20 & n.18,

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[7] "[W]e readopt the description of Tilling's notes and the finding that they are 'probative' of the defendants' consideration of race, but we do not adopt the characterization of that consideration as 'predominant' under the now-relevant Supreme Court standards." *Quilter*, 981 F. Supp. at 1035, App. 1a at 3a.

Appellants merely noted without comment that in his dissenting opinion, Judge Nathaniel R. Jones pointed to this letter as constituting direct evidence supporting the Appellants' position. Jurisdictional Statement, p. 23 n.28. For the reasons stated earlier in this brief, Appellants have declined to argue the facts and instead have properly focused their arguments on the proper legal standard to be applied to uncontested findings of fact.

CONCLUSION

For the reasons set forth above and in Appellants' Jurisdictional Statement, this Court should either:

(1) summarily reverse the judgment below and remand for entry of judgment in Appellants' favor in accordance with the District Court's prior opinion in *Quilter v. Voinovich*, 912 F. Supp. 1006 (N.D. Ohio 1995), App. 63a; or

(2) note probable jurisdiction and reverse the decision of the District Court.

Respectfully submitted,

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